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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

2869 F

OF

THE STATE OF MISSOURI.

HORATIO M. JONES,
REPORTER.

VOL. XXVII.

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JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. WILLIAM SCOTT,

HON. WILLIAM B. NAPTON,

HON. JOHN C. RICHARDSON.

LIST OF CASES REPORTED.

A

	Page
Abeles, Patrick v.	184
Adams v. Wiggins Ferry Co.	95
Alexander, Barron v.	530
Allen v. Moss	354
Altum v. Arnold	264
Ambs, Goetz v.	28
American Iron Mountain Co. v. Evans	552
American Iron Mountain Co., Valle's Adm'rx v.	455
Ames, Aubuchon v.	89
Anderson v. Baumgartner	80
Andrews v. Lynch	167
Andrews, The State v.	267
Armstrong v. Johnson	420
Arnold, Altum v.	264
Aubuchon v. Ames	89
Audrain County Court, Hall v.	329

B

Bain v. Chrisman	293
Baker v. Mockbee	263
Ball, The State v.	324
Bancroft v. Bruning	235
Barbee v. Wimer	140
Barr, Field v.	416
Barron v. Alexander	530
Barton v. Murrain	235
Baumgartner, Anderson v.	80
Beam v. Link	261
Bersch v. Schneider	101
Bissell, Watson v.	220
Blair v. Marks	579
Blakey v. Blakey	39
Blodgett v. Greene	525
Blue v. Penniston	272
Blumenthal, Menkens v.	198
Bowman v. Pacific Insurance Co.	152

	Page
Brackenridge, Yates v.	531
Bradley v. Creath	415
Branham, Moreau v.	351
Bredell's Exec'r, State to use of, v. Baldwin	103
Brosius v. McGaugh	230
Broomfield, Morse v.	224
Bruning, Bancroft v.	235
Bunce, Stanley v.	269
Burns v. Patrick	434
Byrne v. Steamboat St. Mary	296

C

Cachelin, Harrison v.	26
Camp, Gillett v.	541
Carr v. Steamboat Michigan	196
Casey, Town of Potosi v.	372
Cayton v. Hardy	536
Charleson v. Hunt	34
Chick v. Parker	418
Chrisman, Bain v.	293
City of Carondelet v. Desnoyer's Adm'r	37
Clark v. Hammerle	55
Clark, Ross v.	549
Clawwater v. Tetherow	241
Cochran v. Goddard	500
Cohen v. Kyler	122
Collins v. Parker	416
Coons, Crow v.	512
Coons v. North	73
Cooper Common Pleas, Judge of, Williams v.	225
County Court of Audrain County, Hall v.	329
Crabtree, The State v.	232
Creath, Bradley v.	415
Cross, The State v.	332
Crow v. Coons	512
Cummins, Egyptian Levee Co. v.	495

D

Dalton, The State v.	13
Dannefelter v. Weigel	45
Davis v. Slagle	600
Davis, Smith v.	298
Dennin, McAllister v.	40
Desnoyer's Adm'r, Carondelet v.	37
Dessaunier v. Murphy	48
Dickey v. Tennison	373
Dillon v. Rash	243
Doan v. Holly	256

LIST OF CASES REPORTED.

vii

	Page
Dodd v. Winn	501
Drake v. Jones	428
Duff, Holtzclaw v.	392
Dugdale's Adm'r, Leahy v.	437
Duty's (Milton) Estate, in re	48

E

Eads v. Wooldridge	251
Egyptian Levee Co. v. Cummins	495
Egyptian Levee Co. v. Hardin	495
Eldridge v. Steamboat William Campbell	595
Ellis v. Kreutzinger	311
Emnitz, The State v.	521
Epperson, The State v.	255
Evans, American Iron Mountain Co. v.	552

F

Fath v. Meyers' Adm'r	568
Field v. Barr	416
Fickes, Frissell v.	557
Fithian's Adm'r, Squires v.	134
Frasier's Adm'r, Manny v.	419
Frenz v. Frenz	171
Frissell v. Fickes	557
Fugate, The State v.	535
Ferguson v. Ham	249

G

Gibson v. Lewis	532
Gillett v. Camp	541
Goddard, Cochran v.	500
Goetz v. Ambs	28
Grand Lodge of Masons v. Knox	315
Greene, Blodgett v.	525
Gregory, The State v.	231
Griffith v. Schwenderman	412

H

Hall v. County Court of Audrain County	329
Hall's Adm'r, Magwire v.	146
Ham, Ferguson v.	249
Hammerle, Clark v.	55
Hannibal, Ralls County & Paris Plank Road Co. v. Robinson	396
Hannibal & St. Joseph R. R. Co. v. Morton	317
Hardin, Egyptian Levee Co. v.	495
Hardy, Cayton v.	536
Haren, Primm v.	205
Hargadine v. Pulte	428

	Page
Harman, The State v.	120
Harrison v. Cachelin.....	26
Hayden v. Stewart.....	286
Hempstead v. Hempstead's Adm'r.....	187
Herndon v. Herndon's Adm'r.....	421
Herrington v. Herrington.....	560
Hickman v. Kunkle.....	401
Hicks, The State v.....	588
Hoffman v. Riehl.....	554
Holley, Johnson v.....	594
Holly, Doan v.....	256
Holmes v. McGee.....	597
Holt, Thé State v.....	340
Holtzclaw v. Duff.....	392
Hopper, The State v.....	599
How, Missouri Blind Institute v.....	211
Howard, King v.....	21
Howe, Lee v.....	521
Hull v. Lyon.....	570
Hunt, Charleson v.....	34

J

Jaccard v. Shands.....	440
Johnson v. Holley.....	594
Johnson, Armstrong v.....	420
Johnson v. McHenry.....	264
Johnson v. Smith's Adm'r.....	591
Johnson's Adm'r v. McCune.....	171
Johnston v. Mason.....	511
Jones, Drake v.....	428
Judd, Patterson v.....	563
Judge of Cooper Common Pleas, Williams v.....	225

K

King v. Howard.....	21
Knox, Grand Lodge of Masons v.....	315
Kreutzinger, Ellis v.....	311
Kunkel, Stavely v.....	422
Kunkle, Hickman v.....	401
Kurlbaum v. Roepke.....	161
Kyler, Cohen v.....	122

L

Lacy v. Williams.....	280
Leahy v. Dugdale's Adm'r.....	437
Lee v. Howe.....	521
Lewis, Gibson v.....	532
Link, Beam v.....	261
Locké, Vaughn v.....	290

LIST OF CASES REPORTED.

ix

	Page
Logan, Manny v.	528
Lowe v. Sinklear.....	308
Lynch, Andrews v.....	167
Lyon, Hull v.....	570

M

McAllister v. Dennin	40
McCune, Johnson's Adm'r v.....	171
McDonald v. Schneider	405
McGaugh, Brosius v.....	230
McGee, Holmes v.	597
McKnight v. McKutchen	436
McLaughlin, The State v.....	111
McLellan v. Parker.....	162
McMurray, Slowey v.....	113
McO'Brien, The State v.	508
Madden's heirs, v. Madden's Adm'r.....	544
Magwire v. Hall's Adm'r.....	146
Manny v. Frasier's Adm'r	419
Manny v. Logan	528
Marks, Blair v.	579
Martin v. Martin's Adm'r	227
Mason, Johnson v.....	511
Massey, Papin v.....	445
Matthews v. Wilson	155
Mayhall, Spalding v.	377
Mays, Newman v.....	520
Menkens v. Blumenthal.....	198
Menkens v. Watson	163
Meyers' Adm'r, Fath v.....	568
Michigan, Steamboat, Carr v.....	196
Miller v. Wall	440
Mitchell, Sawyer v.	510
Mitchell v. Williams	399
Milton Duty's Estate, in re.....	43
Missouri Blind Institute v. How.....	211
Mockbee, Baker v.....	263
Moore v. Winter.....	380
Moreau v. Branham	351
Morse v. Broomfield.....	224
Morton, Hannibal & St. Joseph R. R. Co. v.....	317
Moss, Allen v.....	354
Murphy, Dessanier v.....	48
Murray, Barton v.....	235

N

Newman v. Mays.....	520
North, Coons v.....	73
North & Scott, The State v.....	464

P

	Page
Pacific Insurance Co., Bowman v.	152
Papin v. Massey	445
Parker, Chick v.	418
Parker, Collins v.	416
Parker, McClellan v.	162
Patrick v. Abeles	184
Patrick, Burns v.	434
Patterson v. Judd	563
Pearce v. Roberts	179
Penneston, Blue v.	272
Perkins v. Woods	547
Perryman's Adm'r, Wadlow v.	279
Phillips v. Riley	386
Picot v. Signiago	125
Potosi, Town of, v. Casey	372
Pratte v. Coffin's Exec'r	424
Price v. White	275
Primm v. Haren	205
Pulte, Hargadine v.	423

R

Rash, Dillon v.	243
Beam v. Watkins	516
Rice, Smith v.	505
Rice v. Underwood	551
Ridgley v. Steamboat Reindeer	442
Ridgley v. Stillwell	128
Riehl, Hoffman v.	554
Riley, Phillips v.	386
Roatcap, Thompson v.	283
Robert, Wiley v.	388
Roberts, Pearce v.	179
Robinson, Hannibal, Ralls County & Paris Plank Road Co. v.	396
Roepke, Kurlbaum v.	161
Ross v. Clark	549

S

Sawyer v. Mitchell	510
Schneider, Bersch v.	101
Schneider, McDonald v.	405
Schwenderman, Griffith v.	412
Shands, Jaccard v.	440
Shapleigh, The State v.	344
Signiago, Picot v.	125
Sinklear, Lowe v.	308

LIST OF CASES REPORTED.

XI

	Page
Simpson v. Simpson	288
Slagle, Davis v.	600
Slowey v. McMurray	113
Smith v. Davis	298
Smith v. Rice	505
Smith's Adm'r, Johnson v.	591
Smock v. White	163
Snead v. Wegman	176
Spalding v. Mayhall	377
Squires v. Fithian's Adm'r	134
Stanley v. Bunce	269
State v. Andrews	267
State v. Ball	324
State v. Crabtree	232
State v. Cross	332
State v. Dalton	13
State v. Emnitz	521
State v. Epperson	255
State v. Fugate	535
State v. Gregory	231
State v. Harman	120
State v. Hicks	588
State v. Hopper	599
State v. McLaughlin	111
State v. McO'Brien	508
State v. North & Scott	464
State v. Shapleigh	344
State v. Young	259
State v. Warne	418
State, to use, &c., v. Baldwin	103
State, to use, &c., v. Holt	340
State, to use, &c., v. Wightman	121
State, ex rel. v. Thompson	365
Stavely v. Kunkel	422
Steamboat Fleetwood, White v.	159
Steamboat Michigan, Carr v.	196
Steamboat Reindeer, Ridgley v.	442
Steamboat St. Mary, Byrne v.	296
Steamboat William Campbell, Eldridge v.	595
Stewart, Hayden v.	286
Stillwell, Ridgley v.	128

T

Taylor, Trigg v.	245
Tebbe, The State, to use of, v. Wightman	121
Tennison, Dickey v.	373
Tetherow, Clawater v.	241
Thomas, Wells v.	17
Thompson v. Roatcap	283

	Page
Thompson, The State, ex rel. v.....	365
Thornton v. Thornton	303
Timmerman, Woods v.....	107
Trigg v. Taylor.....	245
Twyman v. Twyman.....	383

U

Underwood, Rice v.....	551
------------------------	-----

V

Vallé's Adm'rx v. American Iron Mountain Co.....	455
Vaughn v. Locke	290

W

Wadlow v. Perryman's Adm'r	279
Wall, Miller v.....	440
Warne, The State v.....	418
Watkins, Ream v.....	516
Watson v. Bissell	220
Watson, Menkens v.....	163
Wegman, Snead v.....	176
Weigel, Dannefelter v.....	45
Wells v. Thomas.....	17
White, Price v.....	275
White, Smock v.....	163
Wiggins Ferry Co., Adams v.....	95
Wightman, The State, to use, &c., v.....	121
Wiley v. Robert	388
Williams v. Judge of Cooper Common Pleas.....	225
Williams, Lacy v.....	230
Williams, Mitchell v.....	399
Wilson, Matthews v.....	155
Wimer, Barbee v.....	140
Winn, Dodd v.....	501
Winter, Moore v.....	380
Wood v. Steamboat Fleetwood.....	159
Woods, Perkins v.....	547
Woods v. Timmerman.....	107

Y

Yates v. Brackenridge.....	531
Young, The State v.....	259

CASES
ARGUED AND DETERMINED
Green & Wilson
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

MARCH TERM, 1858, AT ST. LOUIS.

[CONTINUED FROM VOL. XXVI.]

THE STATE, Respondent, v. DALTON, Appellant.

1. J. D. and M. G. were jointly indicted for a felonious assault upon one C. H. The indictment charged that they in and upon one C. H. "feloniously and wilfully did make an assault, with a certain knife of the length, &c., which they the said J. D. and M. G. then and there in their right hand had and held, with the intent then and there him, the said C. H., with the knife aforesaid, wilfully and feloniously to kill, against," &c. *Held*, that the indictment was sufficient to sustain a conviction thereon.
2. Evidence of character, to be admissible, must be restricted to that trait of character in issue.

Appeal from St. Louis Criminal Court.

John Dalton and Michael Gaughy were jointly indicted for a felonious assault, with intent to kill, upon one Charles Haufmeister. The second count of the indictment is as follows: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present that John Dalton and Michael Gaughy, late of St. Louis, in St. Louis county, on the thirtieth day of

September, in the year of our Lord one thousand eight hundred and fifty-seven, at St. Louis county aforesaid, with force and arms, in and upon one Charles Haufmeister, in the peace of the state then and there being, feloniously and wilfully did make an assault, with a certain knife of the length of six inches, and of the breadth of two inches, which they, the said John Dalton and Michael Gaughy, then and there in their right hand had and held, with the intent then and there him, the said Charles Haufmeister, with the knife aforesaid, wilfully and feloniously to kill, against the peace and dignity of the state."

The jury found the defendant Dalton guilty as charged in the above writ.

Shreve, for appellant.

Mauro, (circuit attorney,) for the State.

I. The indictment is good. (Whart. C. L. 117; State v. Fley, 2 Brev. 338; State v. Green, 4 Strob, 128; Davis' Precedents, 151; Commonwealth v. Gallagher, 6 Metc. 565; R. C. 1855, p. 567.) If defective it is certainly cured by the statute of jeofails. (R. C. 1855, p. 1177.)

RICHARDSON, Judge, delivered the opinion of the court.

There is no practical distinction in crime between principals in the first and second degree; for if two persons are charged as principals—one as the immediate perpetrator of the injury, and the other as aiding and abetting—it is immaterial which of them is charged as having inflicted the wound or struck the blow, inasmuch as the law imputes the injury given by one as the act of the other. (Whart. Crim. Law, 117.) So that an indictment that A. gave the blow and B. was present and abetting, is sustained by evidence that B. gave the blow and A. was present and abetting. (1 East P. C. 350; 1 Salk. Rep. 335.) But the observation that no distinction is made in this respect in indictments gives no countenance to the practice of charging, against propriety

State v. Dalton.

and the truth, that both held the same knife, club or pistol in the right hand ; and the cases referred to in the note of Wharton do not sanction such a precedent. The indictment in Green's case, 4 Strob. 128, was like the indictment in State v. Fley, 2 Brev. 338, which charged that Jenkins and Fley, with malice aforethought, &c., made an assault on David Minton ; that Jenkins with a gun shot Minton, so that he died, &c. ; that Fley was then and there present maliciously aiding, &c., the murder aforesaid to commit ; and so the jurors say that the said Fley did feloniously, &c., kill and murder said Minton, &c. ; and the court remarked in delivering the opinion that, though it is necessary to state in the indictment the manner of doing the injury, yet if several are present aiding in the perpetration of the act, it is not material whether it is correctly stated which of them did it. See also the precedents in 3 Chit. Crim. Law, 754-5-6.

The averment, however, of the manner in which the instrument is held by which the injury is inflicted is not material ; and if it was so according to the common law rules of criminal pleading it is cured by the sweeping provision of our statute, which declares that "no indictment shall be deemed invalid on account of any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. (2 R. C. 1855, p. 1171, sec. 27.)

The indictment is legally sufficient to sustain a conviction, but a part of it is absurd, and such precedents ought not to be used. The dignity of judicial proceedings requires that the forms employed in the administration of justice should not be incongruous or untruthful on their face, and the literature of the public records should be spared the reproach of unnatural statements when averments according to the facts will answer the purpose as well.

For the purpose of discrediting the prosecuting witness the defendant, after proving that one Prickett was not present at the time of the difficulty, offered to prove that Prickett had been convicted before the recorder and sent to the work-

house on the testimony of Haufmeister. The evidence was properly excluded, for it is not competent to prove a conviction in that way, nor to prove what statements Haufmeister had made before the recorder, without first calling his attention on his examination to his previous statements.

The defendant proved that his general character as a peaceable man was good, but the court sustained the objection to the inquiry as to his character for industry, which was proper; because whenever evidence of character is admissible it is restricted to the trait of character which is in issue and must have reference to the nature of the charge. (3 Greenl. Ev. sec. 25.)

There is no error in the instructions given by the court, and, though the proposition contained in the first instruction asked by the defendant is undoubtedly true, that to maintain the charge against the defendant it was necessary to prove that he was aware of the felonious intent of Gaughy in making the assault, yet the principle was contained in the instruction given, in these words: "In order to render a person an accomplice and a principal in felony he must be aiding and abetting at the fact or ready to afford assistance if necessary, and with a knowledge of the fact to be committed; or, in other words, the aider and abettor must be present aiding and abetting to the felony, with a felonious intent."

There was no proof to justify the suspicion that Gaughy stabbed Haufmeister in self-defence, and therefore there was no propriety in framing the instructions on that hypothesis. Witnesses testified on both sides, whose testimony was contradictory, and after the court had given the instruction that if the jury believed from the evidence that any witness or witnesses in the cause had wilfully testified falsely as to any material fact in the case, they were at liberty to disregard the whole of the testimony of such witness or witnesses, there was no error in refusing the defendant's instruction on the same subject which was aimed directly at one of the witnesses.

All the judges concurring, the judgment will be affirmed.

Wells v. Thomas.

WELLS *et al.*, Defendants in Error, v. THOMAS, Plaintiff in Error.

1. Where one of several companies engaged in transporting goods on the line of a route between two distant points receives goods from another of those companies, and, in accordance with the usual custom in such cases and in ignorance of any special contract made with the company first receiving the goods, pays the freight and charges demanded at the point where they are so received and transports them to their place of destination : *Held*, there being no arrangement or understanding between the companies with reference to "through" transportation, that the company might retain possession of the goods until the consignee should pay its own customary charges for transportation, together with the freight and charges paid by it on its receipt of the goods, although such sum should exceed the amount for which the company that first received the goods agreed they should be transported.

Error to St. Louis Court of Common Pleas.

This was an action for the possession of an omnibus. The cause was tried by the court without a jury upon an agreed statement of the facts, of which the following is the substance : Plaintiffs purchased the omnibus mentioned in the petition, of the value of five hundred dollars, of John Stephenson, in New York, and instructed him to ship it to them at St. Louis, Missouri. Thereupon said Stephenson, for the plaintiffs, on the 24th of September, 1855, made a contract with the New York Central Railroad Company (being a railroad running from New York to Buffalo, in the state of New York) to deliver said omnibus to the plaintiffs at St. Louis for the sum of \$49.33. The bill of lading (which was set forth in the agreed statement) was forwarded to plaintiffs at St. Louis. Stephenson delivered the omnibus to the New York Central Railroad Company to be transported to St. Louis, by which it was carried in the usual mode and time to Buffalo, and there delivered to the Michigan Central Railroad Company, which transported the same to Joliet. At Joliet the omnibus was delivered to the Chicago, Alton and St. Louis Railroad Company to be transported to St. Louis. The Chicago, Alton

and St. Louis Railroad Company received said omnibus in due course of business, without any notice of any special contract for its transportation, and paid to the Michigan Central Railroad Company the sum of seventy-two dollars, the amount of their bill for the freight on the omnibus from Buffalo to Joliet, and the charges they had paid on receiving the same. It is customary for one railroad company, when receiving goods from another railroad company to be carried forward by the former, to pay the freight and charges upon said goods and property up to the point where they are so received. Said omnibus arrived in St. Louis, and was in the possession of defendant, the agent of the Chicago, Alton and St. Louis Railroad Company. The defendant notified plaintiffs of the arrival of the omnibus and requested them to call and pay freight and charges, amounting to \$102.40. The plaintiffs offered to pay \$49.33, and demanded of defendant the omnibus. The defendant refused to deliver it until the freight and charges advanced to the Michigan Central Railroad Company and the freight from Joliet to St. Louis, the latter amounting at the customary rates to \$30.37, should be paid. The plaintiffs refused to pay more than the amount tendered. There was nothing in the amount or character of the charges paid by the Chicago, Alton and St. Louis Railroad Company to the Michigan Central Railroad Company to excite any suspicion that the charges were unreasonable.

The court decided the cause for the plaintiffs. A motion for a review was made and overruled.

N. D. & G. P. Strong, for plaintiff in error.

I. The special contract was improperly permitted to bind the defendant as it was made without any authority from him or the railroad under which he claims, and said railroad received the goods and transported them without notice of any such contract.

II. By the delivery of the omnibus to the New York Central road, the plaintiffs made that road their agents, with authority to deliver to other connecting roads at the end of

Wells v. Thomas.

its route, and so on at the termination of each route; and a delivery by each carrier in the ordinary course of business, without notice of any special contract, authorized the last carrier to whom it was delivered to pay reasonable charges and to recover them at the end of the route, together with a reasonable sum for its own service. (Story on Agency, secs. 73, 126, 127; Edwards on Bailments, secs. 449, 504, 507, 518; *St. John v. Van Santvoord*, 6 Hill. 157; 18 Verm. 141; *Mechs. Bank v. Champlain Trans. Co.* 23 Verm. 186, 209; *Ackley v. Kellogg*, 8 Cow. 223.)

III. A carrier has a lien for reasonable freight and charges, and may retain the goods until they are paid, even though the party to whom the charges were advanced could not have recovered them. (Edwards on Bailments, 548; Chitty on Carriers, 106; Angel on Carriers, secs. 356, 368, 384, 385, 386, 414; *Sage v. Gittner*, 11 Barb. 120; *Bowman v. Hilton*, 11 Ohio, 303; *Bissell v. Price*, 16 Ills. 408.)

IV. The special contract with the New York Central road, if properly in evidence, does not vary the rights of the defendant, he having advanced reasonable charges and transported the omnibus without notice of any such contract.

S. T. & A. D. Glover, for defendants in error.

I. The New York Central Railroad Company contracted to transport the omnibus to St. Louis. The omnibus having come into the possession of the Chicago, Alton and St. Louis Railroad Company, the law presumes that they received it as the agents of the New York Central Railroad Company, to be transported to St. Louis on account of that line, and they can not look to plaintiffs for compensation. (*Fitch v. Newbury*, 1 Dougl. Mich. 1; *Robinson v. Baker*, 5 Cush. 146; *Van Buskirk v. Perrington*, 2 Hall, 561; 5 Term, 604; 4 Esp. 174; 20 Wend. 275; 22 Wend. 318; Angel on Carriers, secs. 365-6.) A carrier can not acquire any better right to property than the party had from whom he received it, and he is bound to see that the true owner has parted with his control over it. He must see that the person offering the

goods for carriage has the right to do so, and he can always protect himself by requiring payment in advance. (Story on Bailm. § 586.) If one carrier has a right to receive property in transitu from another without inquiring into the ownership of it, or the agreement by which it is to be carried, he would be protected in giving it any direction. Property destined for St. Louis and given to a carrier to be delivered there, might be delivered to another and in good faith to be transported by the latter to London. A carrier is bound to take care that the person who delivers them to him has power to do so, and he must see to the character and extent of his authority. The New York Central Railroad Company bound itself to deliver the omnibus at St. Louis, and the duty to perform the contract gave them the implied right to use all necessary and proper means for that purpose; and as their road did not extend beyond the limits of the state, they had the right to employ other agents, but such agents could acquire no other right touching the property than their principals had. The agency of the New York Central Railroad Company was special and only extended to the limit of causing it to be transported to St. Louis for a certain price. (See 20 Wend. 282.)

NAPTON, Judge, delivered the opinion of the court.

Upon the case agreed our opinion is that the defendant was entitled to judgment.

We do not see how the contract made with the New York company is to bind the Alton and St. Louis Railroad Company without showing some privity between these corporations or a knowledge of the contract on the part of the Alton and St. Louis company. No such privity is shown, nor is it pretended that the companies at this end of the route were apprised of any special agreement about the freight. The cases of *Fitch & Gilbert v. Newberry*, 1 Dougl. Mich., and *Robinson v. Baker*, 5 Cush. 137, are not applicable. The Illinois Railroad Company received the omnibus in the usual

King v. Howard.

course of trade from the Michigan company, and paid the freight due at Joliet, as the Michigan company had paid what was due at Buffalo. The omnibus was transported by the route desired and directed by the plaintiffs and indicated by the bills of lading. These transportation companies received the omnibus from the New York Railroad Company, who were authorized to give it this destination. It is not the case of goods shipped on a different line from that directed by the owner or sent to points not authorized.

It is manifest that if we hold the carriers at this end of the route not entitled to their freight because of a contract made by the carriers at the eastern terminus, of which they had no knowledge, great injustice is done to the carriers here, and still greater injury inflicted upon consignees. The carriers must protect themselves by requiring freight in advance, contrary to what has been found in this case to be the established custom.

What may be the proper construction of the bill of lading forwarded to the plaintiffs here by the New York Central Railroad Company is not material to be determined. If the meaning of it be as intended by the plaintiffs, the New York company is of course responsible; but this is no reason why defendants should lose their lien. If any arrangement or understanding existed among these corporations relative to *through* transportation, the rule would be different.

Judge Scott concurring, the judgment is reversed; Judge Richardson not sitting, having been of counsel.

KING, Plaintiff in Error, v. HOWARD *et al.*, Defendants in Error.

1. Where a tenant in common in lands conveys his share to one of his cotenants, he can not have the same partitioned and set apart to him for any purpose.
2. An agreement to refer a matter in dispute to arbitrators can not be specifically enforced.

King v. Howard.

Error to St. Louis Land Court.

The plaintiff, Virginia King, sets forth in her petition that she inherited from her mother Genevieve Howard an interest of one-eighth in a certain lot in the city of St. Louis; that she was entitled to one-eighth on the 28th of August, 1846, and the other children respectively one-eighth; that on said 28th of August, 1846, "she was induced to make an arrangement with the defendant, Louis Howard, by which she conveyed to him her interest in said lot for the sum of \$600, with the agreement on his part that when her said interest should be ascertained by partition it should be valued by appraisers—one to be selected by each—and on their failing to agree that they should choose a third person, who, in connection with themselves, should appraise and estimate the value of her said ascertained interest, and if its value as ascertained should exceed the said \$600, said excess should be paid by the said Louis Howard to the said plaintiff, and if it should fall short of the said \$600 plaintiff was to pay him the difference; all of which is evidenced by his agreement under seal and duly recorded, herewith filed, marked C, which is a lien or mortgage on her said interest for the faithful fulfillment thereof. Plaintiff states that the said Louis Howard has not, nor has any one else, caused a partition to be made of said lot among the owners thereof, whereby the interest of said plaintiff was separated and identified for the purpose aforesaid, although more than ten years have elapsed since the date of said agreement, and although the said plaintiff has frequently requested him to have a partition made for said purposes. Plaintiff applied to the defendant to have said partition made, which he refused to do. Plaintiff therefore prays that your honor, on a full hearing of the matters herein set forth and alleged, will grant a decree that the interest to which the plaintiff was entitled in said lot at the date of said deed and agreement, to-wit, one-eighth, be partitioned, separated and located by metes and bounds for the purpose of ascertaining its value in the manner set forth in

King v. Howard.

said agreement, and in such manner as shall be most equitable and just with all parties, saving and protecting the rights of the plaintiff; and that commissioners be appointed for that purpose. Plaintiff also prays that your honor will cause to be appointed appraisers to value said interest, after it has been ascertained, in case of the refusal or delay of the said defendant Louis Howard to make a selection on his part, and all and such other relief," &c.

The defendants demurred to this petition. The demurrer was overruled. The defendants then answered, averring that partition had been made; that plaintiff's interest had been set apart to Louis Howard. Evidence was introduced tending to show a verbal partition as alleged. The cause was submitted to the court without a jury. The court, at the instance of the plaintiff, gave the following instruction, or declaration of law: "If the court find from the evidence that there has been no partition according to law of the real estate to which the plaintiff was a party, or in which she afterwards acquiesced, then the plaintiff is entitled to recover her interest in the estate of her mother, Genevieve Brazeau, deceased, subject to the conditions of the agreement made between herself and the defendant." The court gave the following declaration of the law at the instance of defendants: "The court declares the law to be that if it has been established by the evidence that partition of the premises in the amended petition described was made among the heirs of Genevieve Howard (or Brazeau) plaintiff can not recover in this action."

The court gave judgment for the defendants.

Morehead and *Shreve*, for plaintiff in error.

Garesché, for defendants in error.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff does not ask to recover damages for the breach of a contract, but the suit is in the nature of a proceeding in equity, in which the plaintiff seeks the specific

King v. Howard.

performance of an agreement for partition of a piece of land, not as an end with the view that the interest of the respective parties may be severally enjoyed by them when set apart, but as preliminary to another purpose, and also to enforce an agreement made by the plaintiff and Louis Howard to submit a question between them to arbitration. Neither of these objects can be attained in the manner proposed by the plaintiff.

It appears that Genevieve Howard died seized of a parcel of land in block number forty-three in the city of St. Louis, which descended at her death to the plaintiff and her other children, in which the plaintiff claimed an interest of one-eighth. On the 28th day of August, 1846, the plaintiff, in consideration of six hundred dollars, which she received, conveyed to her brother, the defendant Louis Howard, by deed duly acknowledged and recorded, all her interest in said block, and in any real estate lying east of said block and west of the Mississippi river, between Lombard and Mulberry streets extended to the river. An agreement under seal was executed by the plaintiff and Louis Howard on the same day, which recites that the plaintiff for six hundred dollars had conveyed by deed to said Howard all her interest in said block and the land east of it to the river, and that as no partition of the real estate had been made between the heirs of Genevieve Howard, the parties mutually covenanted that when partition should be made between the heirs and legal representatives of their mother, according to law, that two appraisers should be chosen, one by each party, to appraise and value the portion allotted to the plaintiff or her assigns, and if the two appraisers to be so appointed should not agree on their estimate, they were to appoint a third person to act as umpire, whose decision should be final. It was further agreed that if the portion allotted to the plaintiff should be valued at a sum less than six hundred dollars, then she should pay to Louis Howard the difference between the appraised value and that sum; but should the appraisement of the share exceed six hundred dollars, Louis Howard was to pay her the overplus.

King v. Howard.

It is manifest that the parties to this contract traded on an approximate estimate of the value of the plaintiff's share, and contemplated another and more satisfactory valuation, to be ascertained when the property should be partitioned by legal proceedings, and the respective interests of each of the heirs set apart. They however mistook the law, for the deed conveyed the absolute title to Louis Howard of all the plaintiff's interest, and the contemporaneous agreement was a mere personal contract, so that in any partition that could be made no portion of the land, for the purpose of being valued, or for any other purpose, could be assigned to the plaintiff, but the interest which she had inherited would necessarily be set off to Louis Howard, and would not be distinguished from any other interest he had. No such partition then as the parties had in view was practicable in a direct proceeding, and it is not perceived how it can be made now in this one. The structure of the body of the petition, as well as the prayer, shows that partition of the land was not asked for as an end, but as a means of getting at something else; and if it was otherwise proper and could be made, the court would not order it for a temporary object, merely for the purpose of laying the groundwork for another suit and to go for nothing as soon as the suit was ended.

The agreement that each of the parties should select an appraiser to value the portion to be set off to the plaintiff can not be specifically enforced. (2 Sto. Eq. § 1457.) Lord Eldon said, in *Street v. Rigby*, 6 Ves. 815, that no instance is to be found of a decree for specific performance of an agreement to name arbitrators; and Mr. Justice Story, in *Tobey v. The County of Bristol*, 3 Sto. 800, notices the authorities, and in a lucid opinion states as his conclusion that an agreement to refer to arbitration can neither be set up as a bar to a suit at law or in equity. Nor can it be enforced in a court of equity when either party as plaintiff seeks it. An agreement for arbitration is, in its nature, revocable, and, though an award when made will be enforced, parties will not be compelled to submit a controversy to arbitrators, nor

Harrison v. Cachelin.

will they be compelled to perform an agreement for that purpose after they have made it. How could the court compel the parties to select appraisers? and if even the parties selected them, the court could not require the appraisers to select a third person to act as umpire in the event of their disagreement; and if either party should refuse to name an appraiser, the court has no authority to appoint or substitute any other person. (*Agar v. Macklew*, 2 Sim. & Stuart, 418.) The plaintiff has mistaken her remedy, which, as we have seen, is not of the nature of a proceeding in equity, but must be obtained by the assignment of proper breaches of the covenants contained in the agreement. The other judges concurring, the judgment will be affirmed.

HARRISON, Appellant, v. CACHELIN *et al.*, Respondents.

1. Instructions should not be given unless supported by the evidence.

Appeal from St. Louis Land Court.

Casselberry for appellant, cited *Harrison v. Cachelin*, 23 Mo. 124; *Reilly v. Chouquette*, 18 Mo. 225; 10 Watts, 142; 4 Whart. 298; 25 Penn. 252.

Whittelsey, for respondents, cited *Martin v. Whittington*, 4 Mo. 518; *Campbell v. Hood*, 6 Mo. 211; 6 Mo. 250; 7 Mo. 220; *Watts v. Douglas*, 10 Mo. 676; 19 Mo. 307; *State v. Anderson*, 19 Mo. 246; *Menkens v. Ovenhouse*, 22 Mo. 70; *Williams v. Dongan*, 20 Mo. 186; 5 Metc. 173; 9 Mo. 477; 18 Mo. 220.

RICHARDSON, Judge, delivered the opinion of the court.

When this case was first before this court (23 Mo. 117) it was decided that the defendants had no title in law or equity, and on the last trial they did not attempt to set up any, but relied solely on the statute of limitations.

Harrison v. Cachelin.

The court gave the following instruction at the request of the defendants: "If the jury believe from the evidence that the defendants and those under whom they claim have had open and visible possession of the premises in dispute under a claim of title adverse to the title of the city of Carondelet and of the plaintiff for the period of twenty years next before the commencement of this suit, they will find for the defendants." If an instruction contains a correct proposition of law, it will not be exceptionable, if there is any evidence to warrant it, no matter how conflicting or how little it may be; but there must be some evidence; and where the whole case turns, as this did, on a single point, an instruction like the one given, without any proof to support it, is not simply obnoxious as a harmless abstraction, but is pregnant with mischief as tending to mislead the jury, in assuming facts that did not exist. I would be opposed to disturbing this judgment if there was the least evidence on which to base the instruction; but this is not a case of conflicting testimony, or of doubt, as to the side on which it preponderated, but a total absence of any proof to give color to the hypothesis on which the instruction was framed. Not a single witness on either side, or all of them together, proved an uninterrupted possession for twenty years, and the defendants not only failed to make out their defence, but *affirmatively disproved* it and established by every one of the witnesses they introduced, who undertook to connect the several possessions, that there was a gap of six or eight years after 1844, during which time there was neither house nor fence nor occupation of any kind, nor any thing else to indicate the appearance of a hostile claim or possession; and if the plaintiff during that time had been diligently seeking a law suit, he could not have found any person against whom he could have maintained an action of ejectment for this lot. A party should not suffer the penalty of losing his right by not suing, where there is nobody to sue, and in this case there was a space covering several years, a part of the time necessary to make up the period of twenty years, during which the plaintiff could not have made an

entry to avoid the statute because there was no one to enter upon.

It is conceded on both sides that the plaintiff has *prima facie* a perfect paper title and is entitled to recover the possession unless the defendants have shown a better right to it. Now if they have a title to the land by limitation or otherwise, let them keep it; but to tell the plaintiff that he has the title and that the defendants have not, and yet refuse to give him the benefit of it, is "holding the word of promise to the ear, but breaking it to the hope." Whatever equity it was supposed the defendants had, has been heretofore declared by this court to be insufficient to protect their possession, and it can not be worked out through the sympathies of a jury. No case was made for an instruction on the statute of limitations, and the judgment will be reversed and the cause remanded; Judge Scott concurring; Judge Napton dissents.

SCOTT, Judge. The instructions given by the court in relation to the statute of limitations seem to me to be inconsistent with each other. The instruction given for the plaintiff was a correct one, but its force was immediately impaired by that given for the defendants. It seems to be obvious that both instructions should not have been given.

GOETZ, Respondent, v. AMBS, Appellant.

1. It is generally sufficient in pleading to state facts according to their legal effect; an averment, in a petition in trespass, that the defendant beat and struck plaintiff, will be sustained by evidence showing that he was present aiding and encouraging others in so beating and striking him.
2. To warrant a jury in giving exemplary damages, in an action of trespass, it is not necessary to show that the defendant was prompted by ill will and hostility toward the plaintiff.
3. If an injury to the person be committed unintentionally and result simply from a want of care, the damages awarded should be compensatory; if it be wilful and intentional, exemplary damages may be allowed.

Goetz v. Ambs.

4. Where in an action of trespass the defendant seeks to show that the plaintiff has no interest in the suit, that he has assigned the cause of action or any interest in the judgment that he expected to obtain, he must set up this matter in his answer.
5. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption.

Appeal from St. Louis Court of Common Pleas.

This was an action for an assault and battery. On the first trial of the cause the jury gave a verdict in favor of the plaintiff and assessed the damages at the sum of two thousand dollars. The supreme court granted a new trial on the ground of the excessiveness of the damages. (See Report of case, 22 Mo. 170.) On the new trial the evidence showed a permanent loss of one eye. The jury found a verdict for the plaintiff and assessed the damages at the sum of three thousand dollars.

The court, at the instance of the plaintiff, gave the following instructions: "1. If the jury find for the plaintiff, they should allow such damages as will compensate him for the expenses he incurred in endeavoring to cure himself of the injury by the defendant and for his loss of time, and for any damage he may have suffered, permanent or otherwise, to him in pursuing his trade in consequence of such injury; and in addition thereto may allow such further sum, for exemplary damages or smart money, as they may, under all the circumstances and facts in evidence, deem right. 2. If the jury shall believe from the evidence that the plaintiff was struck in his left eye by the defendant with the butt end of a whip which he held in his hand, they will find for the plaintiff and assess such damages as from the evidence he has sustained; and in addition thereto may allow such further sum, for exemplary damages or smart money, as they may, under all the circumstances and facts in evidence, deem right. 3. If the jury believe from the evidence that the defendant did commit the assault and battery complained of, then the defendant can not, under the pleadings, set up any matter in justification of the same."

The court, of their own motion, gave the following: "If the jury find for the plaintiff, it is for them to determine whether they will allow exemplary damages, and if so, how much. In determining the question of exemplary damages, they should consider all the facts and circumstances connected with the inflicting of the injury, and the motives and conduct of the defendant at the time, if the injury was inflicted by him. 5. If the jury believe from the evidence that the blow in question was not struck by the defendant, and that he did not participate in the quarrel except for the purpose of preserving the peace or preventing a disturbance, and did not instigate or countenance the giving of the blow in question, then they should find for the defendant. 6. If there was a quarrel or general fight at the Camp Spring garden at or about the time the plaintiff was injured, and the plaintiff did not participate therein, then that fact should not be considered as mitigating the damages if the defendant intentionally struck the plaintiff in the manner charged. 7. If the jury believe from the evidence that any witness has wilfully testified falsely to any material fact, they should reject all parts of his testimony which are false, and are at liberty to reject his testimony altogether. It is the exclusive province of the jury to determine what weight should be given to the testimony of each witness."

The defendant asked the following instructions, which were refused: "1. If the jury should find that any other person than Ambs struck the plaintiff, by means of which striking plaintiff was injured as complained of, then they should find for the defendant, even if they should be of opinion that defendant was present countenancing such striking. 2. The jury must find for the defendant, unless they are satisfied that the defendant committed the injury complained of in person. 3. Unless the jury believe from the evidence that defendant deliberately and maliciously struck the plaintiff with the intent to injure him, then they ought not to give exemplary damages against him. 4. In allowing smart money to plaintiff, in case the jury should find for plaintiff,

Goetz v. Ambs.

the jury should consider mainly the malicious intent and motive of defendant in committing the injury complained of."

The court, at the instance of the defendant, gave the following instruction: "If the jury believe that any one witness in this case has corruptly sworn falsely to any statement in his testimony, then the jury are bound to disregard the whole of such statement, and may discard the entire evidence of such witness. The jury are left the exclusive judges of the credibility of witnesses, and must weigh the testimony of each witness in accordance with all the facts proved."

Hudson & Thomas and Reynolds, for appellant.

I. The first and second instructions given were erroneous. They did not tell the jury what facts and circumstances would authorize them in giving smart money. The fifth instruction was also erroneous. It did not tell the jury what acts the appellant might do to prevent a disturbance or to preserve the peace. The first two instructions asked by defendant should have been given. The petition alleges that the appellant struck the blow, and, unless he did, the respondent could not recover. The third instruction should have been given. Exemplary damages are not allowed unless the wrong was committed deliberately and maliciously. A party may do an act intentionally in the heat of passion and there still be a total absence of deliberation or malice. (Sedgwick on Damages, § 253.) The court should have granted a new trial. The damages were excessive. (*Goetz v. Ambs*, 22 Mo. 170; *Sedgwick*, 455-9; 2 *Greenl. Ev.* § 253, 256-7.)

H. N. Hart, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The instructions given by the court, on the points they touched, contained general and correct propositions of law, and, as they did not purport to comprehend every view of the case, they were not exceptionable for omitting to cover the whole ground. The defendant could have asked instructions

on any aspect of the case not embraced in those already given, and could have saved his exceptions if they had been refused; but it would be a dangerous practice for this court to establish that every judgment must be reversed, because, though each instruction is correct by itself, yet as a whole they fail to notice some legal proposition that properly arises on the evidence.

The first two instructions asked by the defendant and refused contain the proposition that the plaintiff can not recover for any injury he sustained unless the defendant personally inflicted it. These instructions are not defended on the ground that all persons who are present aiding and encouraging a trespass are not equally guilty with the one who strikes the blow; but it is insisted that the allegation in the petition must correspond with the real fact, and that the plaintiff could not recover short of proof that the defendant struck him, even though it appeared that he was present aiding and abetting another person who did strike. It is generally sufficient in pleading to state facts according to their legal effect; as an averment that A. and B., as partners, made a note, will be sustained by proof that one of them signed it in the name of the firm. So, in an indictment for murder that A. struck the fatal blow, and B. was present aiding and abetting, will be sustained by proof that B. was the actual perpetrator of the deed, and A. was present aiding and abetting; for the injury given by one is, in judgment of law, the injury of the other. And surely greater strictness is not required in civil than in criminal pleading.

The defendant's third and fourth instructions were also properly refused, for they give an undue prominence to the idea of deliberation and malice, which was calculated to mislead the jury. They implied that the defendant must have been prompted by ill-will and hostility towards the plaintiff—a state of feeling which is not necessary to exist to warrant the jury in giving exemplary damages.

If an injury is unavoidable or the conduct of the defendant is without fault, no action will lie, and a trespass, to give a

cause of action, must either be wilfully committed or proceed from a want of due care. The intention is immaterial if the defendant is in any manner to blame, and it only becomes material in considering the question of exemplary damages. If the injury is not intentional, but results simply from a want of proper care, nothing more should be recovered than will compensate for the actual damage; but if the act is wilful or intentional, then "the idea of compensation is abandoned, and that of punishment is introduced." It is said generally that malice must exist to entitle the plaintiff to any thing more than reparation for the injury; but it will be found that the word malice is always used, in such connections, not in its common acceptation of ill-will against a person, but in its legal sense, "wilfulness—a wrongful act, done intentionally, without just cause." (*United States v. Taylor*, 2 Sum. 586.) The term malice imports, according to its legal signification, nothing more than that the act is wilful or intentional; and when used to qualify the character of a trespass, it is only employed to distinguish it from that class of injuries which one person may inflict upon another without the intention to do harm, but for which he is responsible because the act is not unavoidable.

The defendant called the plaintiff to the stand as a witness and asked these questions: "Did you, since the institution of this suit, at any time assign any interest in this action to any person; if so, to whom, and what interest? Have you made any agreement with any person or persons, since the institution of this suit, by which such other person or persons are to receive any share or benefit of any judgment to be rendered?" The plaintiff's counsel objected to the questions, and the objection being sustained by the court the plaintiff did not answer them. The defendant's answer did not set up any defence on the ground that the plaintiff had no interest in the suit, or that he had assigned the cause of action or any interest in the judgment he expected to obtain, and the testimony sought to be elicited by the question could not have furnished the jury with any proper assistance in estimating the plaintiff's damages.

Charleson v. Hunt.

The judgment on the first verdict in this case was reversed because the damages allowed by the jury were thought to be excessive. (See 22 Mo. 170.) On the last trial the verdict was for a greater amount than on the first, and it is now argued that the objection which was fatal to the first judgment applies with greater force to this one. But, in our opinion, the fact that one judgment has been reversed on account of excessiveness of the damages, is the best reason why the second should not be reversed for a like cause. Whilst the estimate of damages in actions of this kind is the proper office of the jury, the court thought that the evidence did not justify so large a verdict, and that justice would be promoted by giving the defendant a new trial before another jury. A second trial has taken place and a larger verdict has been returned, without any imputation on the conduct of the jury, and something is due to the opinion of two juries. Another interference by the court would not only be an unwise exercise of its power, but would seem to be a usurpation of the province of the jury; and we have no assurance that if another new trial were granted the defendant would be more fortunate than he has been. The general rule on this subject is well stated by Mr. Sedgwick, in his work on Damages, (p. 466,) "That, although the court are entirely satisfied that the damages are excessive and altogether beyond a compensation for the actual loss sustained, they will not, on motion for a new trial, interfere with the finding, unless the verdict is so extravagant as to bear evident marks of prejudice, passion or corruption."

All the judges concurring, the judgment will be affirmed.

CHARLESON *et al.*, Appellants, v. HUNT, INTERPLEADER, Respondent.

1. The fact that a defendant is present in court, during the trial of the cause, in obedience to a subpoena, ready to testify when called, will not render it improper to receive in evidence a deposition of said defendant taken in another cause in which he was a party; though not admissible as a deposition, it may, being signed by him, be received as a written admission.

Appeal from St. Louis Circuit Court.

Plaintiffs commenced a suit by attachment against Edward St. Michel. Francis A. Hunt interpleaded, claiming the property attached by virtue of a deed of assignment executed by said St. Michel for the benefit of his creditors. Said Hunt had likewise interpleaded in various other attachment suits commenced by parties other than the plaintiffs in this suit. To prove fraud in the assignment and a knowledge of it on the part of the interpleader, the plaintiffs offered in evidence a deposition of said interpleader taken in one of the other attachment suits in which he had interpleaded. The court excluded it. The plaintiff had subpoenaed said Hunt, and he was present in court ready to testify when called. Plaintiffs also called as a witness the notary who took the deposition, and offered to prove by him the declarations and statements of said Hunt contained in his deposition, and proposed that he should read the deposition to refresh his memory.

A. J. P. Garesché, for appellants.

I. The deposition was improperly excluded. (*Kritzer v. Smith*, 21 Mo. 296; *Murray v. Oliver*, 18 Mo. 405.)

Polk and Henry N. Hart, for respondent.

I. The deposition was properly excluded. Hunt was in court ready to testify. (See R. C. 1855, p. 658, § 28.)

RICHARDSON, Judge, delivered the opinion of the court.

On the trial of the issue made by the interplea, the plaintiffs offered in evidence the deposition of Hunt, which had been previously taken in a suit between Lattimer et al., plaintiffs, and St. Michel, defendant, which was excluded because Hunt was in court in obedience to a subpoena, ready to be called as a witness. We assume that Hunt's hand-writing was admitted or proved, for no objection was made on the ground that he had not subscribed the deposition. The only point in this case was decided in *Kritzer v. Smith*, 21

City of Carondelet v. Desnoyer's Adm'r.

Mo. 296. The paper was not offered as a deposition but as written admissions by the interpleader; and the statute which gives the right to examine the adverse party as a witness was not designed to exclude the ordinary means of proof, and it is competent to prove as admissions the oral or written statements of a party to the suit, though he might be called as a witness.

The other judges concurring, the judgment will be reversed and the cause remanded.

CITY OF CARONDELET, Respondent, v. DESNOYER'S ADMINISTRATOR, Appellant.

1. Where a judgment is rendered against a person in his lifetime it need not be allowed as a demand against his estate; a transcript of the judgment may be filed in the probate court and the court should determine its class.
2. A covenant not to sue one of several persons jointly liable will not discharge the others.

Appeal from St. Louis Circuit Court.

The city of Carondelet recovered two judgments in the St. Louis circuit court—one for \$366.66 against John F. Barada as principal, and Alexander Desnoyer and Etienne Hebert as sureties, on an official bond executed by them—the other judgment being for \$1263.64, against said Barada as principal, and Alexander Desnoyer and Antoine Chouquette as securities, on another official bond. On the 30th of January, 1856, the council of the city of Carondelet passed an ordinance authorizing the mayor of the city “to accept from Antoine Chouquette, one of the sureties of John F. Barada, one-half of the amount of the judgment recovered against Barada and his sureties; and on payment of said sum the mayor shall make and deliver to Chouquette a proper deed of assurance, agreeing on the part of the city not to institute or prosecute any further suit or proceeding against Chouquette

City of Carondelet v. Desnoyer's Adm'r.

on his bond of suretiship for said Barada, or the judgment already recovered; the said agreement to be without prejudice of the right of the city to prosecute and collect of said Barada and his other surety the remainder of what may be due on said bond and judgment."

Chouquette paid one-half of the judgment in question, and the mayor of the city of Carondelet executed in his favor a deed of covenant, under the seal of the corporation, substantially following the language of the above ordinance. At the December term of the St. Louis probate court the city of Carondelet presented a demand against the estate of Alexander Desnoyer, based upon the two judgments above mentioned, claiming the whole of the first judgment and one-half of the second judgment. The probate court allowed plaintiff's demand on the first judgment, and refused to allow the same upon the second judgment. Plaintiff appealed to the circuit court. Before the hearing of the cause the defendant moved the court to dismiss the cause on the ground of a misjoinder of two distinct causes of action. The motion was overruled.

Defendant asked the court to declare the law to be, that by operation of said ordinance and deed of covenant the said Alex. Desnoyer and his estate were released from all liabilities on account of the judgment and bond in said ordinance and deed of covenant mentioned. The court refused so to declare the law, but, on motion of plaintiff, declared the law to be, that said ordinance and deed of covenant did not operate as a release of Alexander Desnoyer; whereupon the court found for the plaintiff in the sum of \$1084.49.

Taussig, for appellant.

I. The plaintiff improperly joined two different and distinct causes of action in one suit.

II. A covenant never to sue operates as a release of the covenantee. (2 Pars. on Contr. 219; *Reed v. Shaw*, 1 Blackf. 245; *Cuyler v. Cuyler*, 2 Johns. 186; 2 Wm. Saund. 47, notes.) The ordinance and deed of covenant are stronger

City of Carondelet v. Desnoyer's Adm'r.

than a mere covenant not to sue. The city had already obtained judgment. (See 1 Pars. on Contr. 23; 2 Roll. Abr. 412, G.; 2 Salk. 574; Milliken v. Brown, 1 Rawle, 391.) The release of Chouquette operated as a release of Desnoyer.

Casselberry, for respondent, cited 7 Johns. 207; 4 Greenl. 421; 2 Dana, 107; 19 Wend. 129; 2 Johns. 448; 6 Taunt. 289; 1 Marsh. 603.

Scott, Judge, delivered the opinion of the court.

The proceeding in this case is irregular. The city of Carondelet recovered two judgments against Alexander Desnoyer as security for John F. Barada on two of his official bonds. The securities in one bond were Alexander Desnoyer and Etienne Hebert, and in the other Alexander Desnoyer and Antoine Chouquette. The city blended these two judgments in one and presented them as a claim against the estate of Desnoyer as an original demand which had never been allowed, and a judgment was given against it for the demand in its new shape.

These being judgments rendered against Desnoyer in his lifetime, there was no necessity for having them allowed again. All that was required on the part of the city was to file in the probate court transcripts of the judgments obtained in the circuit court in order to have them classed and paid as other demands allowed against the estate. (R. C. 1855, secs. 26 and 27, p. 156.) By treating these judgments as the foundation of an original claim, they lose their class, for, being made the foundation of a new judgment, they could no longer be regarded as judgments rendered against the deceased in his lifetime, but must be looked upon as any other claim that has not been allowed, and a new judgment is entered upon it which will be placed in a lower class than that occupied by judgments rendered against the deceased in his lifetime. By jumbling separate judgments in this way the interests of separate sets of securities are confounded, and it will become a matter of difficulty to settle and adjust their rights.

Blakey v. Blakey.

The agreement between the city and Chouquette did not affect Desnoyer. It will be time for him to complain when Carondelet does any thing affecting his rights injuriously as a surety. The agreement with Chouquette did not release or discharge the judgment. So far as Desnoyer was concerned it only operated as the endorsement of satisfaction to the amount paid by Chouquette. (Bryan v. Mundy's Adm'r, 14 Mo. 462.)

The other judges concurring, the judgment will be reversed.

BLAKEY, Respondent, v. BLAKEY, Appellant.

1. Where a builder contracts to build a house, he can have no lien for services rendered in superintending his own workmen.

Appeal from St. Louis Land Court.

Bay, for appellant.

A. W. Lewis, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was brought to enforce a mechanic's lien for work done and materials furnished in building a house for the defendant. The plaintiff in his petition asks judgment for a balance alleged to be due to him, but he does not say whether the house was built under a special contract, or whether he sought to recover on a *quantum meruit*. The account annexed to the petition contains various items for materials and for work done by different carpenters for a certain number of days, at two dollars and a half per day for each hand, and also this item: "To 114 days' services of self, in working and superintending building from May 1st up to 23d December, 1856, at \$3 per day—\$342."

The evidence is very indefinite and unsatisfactory not only as to the value of the work and materials, but also as to the nature of the plaintiff's undertaking. It appears, however,

McAllister v. Dennin.

that the workmen were employed by the plaintiff as his hands, and that, instead of charging a given sum for the work, he charged the defendant two dollars and fifty cents for every day each workman was engaged, though he did not pay any of them that much. If the plaintiff contracted to build the house for a certain price, or for whatever the job might be worth, it is difficult to understand on what principle he could charge the defendant for superintending his own hands; and if he undertook to employ workmen for the defendant and to superintend them, he ought not to be paid for services as superintendent and to speculate at the same time on the wages of the workmen. The law gives the mechanic, builder, artisan, workman, laborer, or other person, who may do or perform any work upon or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished; but it has no such elastic power as is claimed for it in this case, and it can not be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen.

The defendant asked the court to instruct "that the plaintiff is not entitled to recover in this action for superintending the work in the building;" but the instruction was refused, and for that reason the judgment will be reversed and the cause remanded. The other judges concur.

MCALLISTER, Defendant in Error, v. DENNIN *et al.*, Plaintiffs in Error.

1. A release of one of several joint obligors discharges all; to have this effect, however, it must be a technical release under seal.

Error to St. Louis Court of Common Pleas.

Roger C. McAllister and Thomas O'Flaherty, partners, obtained a judgment against John Lowrie, Patrick Dennin, and David E. Rees, for the sum of \$2100.94. On the 23d of

McAllister v. Dennin.

December, 1856, McAllister, acting for himself and as the administrator of his deceased partner O'Flaherty, executed in favor of John Lowrie the following instrument: "Received, St. Louis, December 23, 1856, from John Lowrie, five hundred dollars, which is in full of all demands now existing against him and in our favor, and especially in full satisfaction of, and we do hereby fully and absolutely release said John Lowrie from, all liability whatsoever, either as debt, damages or costs, by virtue of a certain judgment rendered by the St. Louis court of common pleas in a certain cause wherein we, the undersigned, Roger C. McAllister and Thomas O'Flaherty are plaintiffs, and Patrick Dennin, David E. Rees and said John Lowrie are defendants, on the 21st day of March, A. D. 1850, for \$2100.94, the said cause being numbered 41 to the September term, 1849, "Returns;" and it is especially understood and agreed upon that this receipt and release is not to work a release of any of the other defendants in said cause, but only the said John Lowrie. The writer would merely state that McAllister and O'Flaherty obtained a judgment several years since, in the St. Louis court of common pleas, against John Lowrie, David E. Rees and Patrick Dennin for balance due by steamer Belmont and owners. We have no other judgment against John Lowrie; and for the sum of five hundred dollars we hereby release the said John Lowrie from all claim, liability or demand for the said judgment (but not any of the others) and in full of all and every claim and demand up to the present date against the said John Lowrie. [Signed] Roger C. McAllister, and R. C. McAllister, administrator of the estate of Thomas O'Flaherty, deceased."

Dennin and Rees moved the court to enter satisfaction of the judgment above mentioned. This was made upon the above instrument. The court overruled the motion.

H. N. Hart, for plaintiffs in error.

Hudson & Thomas, for defendant in error.

I. A release without consideration and not under seal is

McAllister v. Dennin.

void. (*Seymour v. Minturn*, 17 Johns. 169; *Jackson v. Stackhouse*, 1 Cow. 122.) The debtor only paid a part of a judgment, the whole of which he was liable for. A release not under seal of one of several covenants will not discharge the co-covenanters. (9 Wend. 336; *Seely v. Spencer*, 3 Verm. 334; *Rowley v. Stoddard*, 7 Johns. 207; *Shotwell v. Miller, Coxe*, 81; *Andrews v. Andrews*, 1 Root, 72.) Even a technical release will be construed according to the intention of the parties, and will not operate as a release unless that intention appears from the face of the instrument. (7 Com. Dig. 222, tit. Release; 6 Bac. Abr. 635.)

RICHARDSON, Judge, delivered the opinion of the court.

The receipt on which the motion was grounded shows that only five hundred dollars, less than one-third of the amount of the judgment, has been paid, and that the defendants did not intend to release the residue of the judgment. The question then is, whether this instrument of writing without a seal operates as an extinguishment of the whole judgment, against the manifest intention of the parties to it and in the face of the fact that only a portion of the debt has been paid, and that too by neither of the plaintiffs.

It is an undoubted rule of law that a release to one of several obligors discharges the others; but an instrument of writing that has this effect, and that can be taken advantage of by the others as a discharge, must be a technical release under seal. (*Rowley v. Stoddard*, 7 John. 267; *Seymour v. Minturn*, 17 Johns. 170; *Jackson v. Stackhouse*, 1 Cow. 122; *Dozing v. Bailey*, 9 Wend. 336; *Seely et al. v. Spencer*, 3 Verm. 334; *Baily v. Day*, 26 Maine, 88; *Shaw v. Pratt*, 22 Pick. 305; *Gibson v. Weier*, 1 J. J. Marsh. 446.) The principle is too well established to be debatable, and it is unnecessary to discuss the reason on which it is founded or to review the authorities that support it.

The judgment is affirmed; the other judges concurring.

IN THE MATTER OF MILTON DUTY'S ESTATE.

1. Although an appeal will lie from an order of a probate court revoking letters of administration, yet, where the revocation is made for the reason that a will had been found and admitted to probate, the circuit court can not on such appeal inquire into the sufficiency of the proof upon which the probate court acted in granting probate of the will.
2. The validity of a will duly proven can be contested only in a proceeding instituted for that purpose under section 30 of the act concerning wills (R. C. 1845, p. 1083; R. C. 1855, p. 1571, sec. 30); an appeal will not lie from an order of a probate court granting probate of a will.

Appeal from St. Louis Circuit Court.

On the 22d day of June, A. D. 1850, letters of administration were granted to Thomas Harney upon the estate of Milton Duty. On the 5th of March, 1856, the probate court revoked the letters for the reason that a will was produced and admitted to probate. Harney appealed from the judgment of the court revoking his letters. The circuit court, on appeal, rendered its judgment revoking said letters, and from that judgment Harney has appealed to this court. The will provided for the manumission of certain slaves, who, by their counsel, appeared and contended for the revocation of said letters and the establishment of the will. At the trial below, there was offered in evidence, in their behalf, a transcript of the will and of the judgment of the probate court admitting the same to probate. Said transcript also contained the evidence upon which the will was admitted to probate, and the said Harney, by his counsel, objected to the admission of the said transcript of said will and judgment, unless the evidence aforesaid were offered in connexion therewith; but the court overruled said objection and the appellant excepted to said ruling. The appellant then offered his letters of administration in evidence. This was all the testimony.

The court was asked to declare the law to be, that upon the evidence the court should find for the appellant; which declaration the court refused to make. The court rendered its judgment revoking said letters as aforesaid.

In the Matter of Milton Duty's Estate.

Krum & Harding, for appellant.

I. An appeal for an order revoking letters of administration is expressly granted by statute. (R. C. 1845, p. 106, § 3.) It was the duty of the circuit court to hear and determine the cause anew. (Id. p. 107.) This was not done; on the contrary, the circuit court refused to try the cause anew. The production of a will was not sufficient to authorize a revocation of letters of administration. (Id. 67.) Not only must there be a will but probate thereof must be granted before an order can be made to revoke letters of administration previously granted. Whether the will in this case was duly admitted to probate, that is, duly proved by competent testimony, was the very question that was involved in the decision or order of the probate court that was appealed from. The circuit court assumed that there was a will, and that its production, whether proved or not, was sufficient to justify a revocation of the appellant's letters. This in effect is making the mere fiat of the probate court in revoking letters conclusive. The circuit court, on being possessed of the cause, should have heard the proofs, that is, the testimony which the law requires to establish a will, and then decided whether this was Milton Duty's will or not; for upon that decision depended the question whether Harney's letters were lawfully revoked.

Hart and Biddlecome, for Jordan and others.

I. It was not competent for the circuit court, on the appeal, to inquire into the sufficiency or competency of the evidence upon which the probate was granted.

RICHARDSON, Judge, delivered the opinion of the court.

The administration act of 1845 provides that if, after letters of administration are granted, a will of the deceased be found and probate thereof granted, the letters shall be revoked and letters testamentary, &c., shall be granted; and though the same statute gives the right of appeal from the county to

Dannefelter v. Weigel.

the circuit court on orders revoking letters testamentary or of administration, the jurisdiction which the circuit court acquires on the appeal does not draw to itself the right to inquire into the character or sufficiency of the proof on which the county court acted in granting probate of the will.

An appeal will not lie from the judgment of the county court admitting a will to probate, and the 31st section of the act concerning wills prescribes the only mode by which the judgment of the county court in rejecting or admitting a will to probate can be inquired into. The appellant could have opposed and contested, in the probate court, the validity of the will, or the sufficiency of the proof on which it was proposed to admit it to probate; but, after it was established, the probate thereof was conclusive in a collateral proceeding, and, the will having been found and probated, the revocation of the letters of administration, which had been previously granted, followed by operation of law. The circuit court, on the appeal from the order revoking the appellant's letters of administration, could not go behind the judgment of the probate court granting probate of the will; and the only questions which the appeal carried up were, not whether the proof was sufficient to authorize the probate of the will, but whether a will of the deceased had been found and probate thereof granted.

The other judges concurring, the judgment will be affirmed.

DANNEFELTER, Appellant, v. WEIGEL, Respondent.

1. Where a party to a suit, through no negligence on his part, but through reliance upon the promises of a notary before whom a deposition is being taken, and of the opposing counsel, is prevented from cross-examining the witness, the deposition should be suppressed.
2. Where the delivery of a chattel is conditional, the property will not vest until the condition is performed, or the performance thereof is waived.

Appeal from St. Louis Court of Common Pleas.

Spies & Burt, for appellant.

Kribben, for respondent.

RICHARDSON, Judge delivered the opinion of the court.

In our opinion, the court ought to have sustained the plaintiff's motion to suppress the deposition of Louisa Bollet.

The inattention and negligence of attorneys ought not to be encouraged or countenanced; but in this case Mr. Spies was not guilty of either, but acted under an emergency and on assurances that would have lulled the most prudent man into security. It appears from his affidavit that he attended for his client on the day and hour and at the place appointed by the defendant in his notice for taking depositions; that he found there the notary, the witness, the defendant and Mr. Kribben his attorney, and that as his wife, who was an invalid and was about to leave the city for her health, required his attention for a little while, he requested the notary and Mr. Kribben not to delay taking the deposition, but to detain the witness for an hour that he might cross-examine her on his return. They promised to do as he had requested, and on the faith of their promise he went away, but returned within an hour, and, as he believes, in about half an hour, when he found that the witness had given her deposition and left. The sudden leaving of the witness was explained by the statement that she was in a hurry; but the notary and the plaintiff's attorney promised that she should be at the office again that day at five o'clock, at which time he attended, but she was not there, and the promise was renewed that she should be there the next day at the same hour. He again attended the next day at the appointed time, but the witness was still absent; when another appointment was made, with the like result, at which time he was informed that they could not procure her attendance for the reason that she had left the city the day before to reside in Illinois.

Dannefelser v. Weigel.

No blame is attached to Mr. Kribben in this transaction, for his promise was no doubt made in good faith and dictated by a proper professional courtesy, and he manifested every disposition to redeem it. But his client was present and heard the request and promise; the witness was at that time in his employment and an inmate of his family, and as she did not leave the city until several days after her deposition was taken, it is hardly probable that he could not have secured her presence again before the notary in order to be cross-examined by the plaintiff.

The evidence of Gamnitz, a workman in the employ of plaintiff, if it does not show that he had no authority to deliver the buggy, clearly shows that it was a conditional delivery; and in that case the title did not vest in the defendant until he had performed the condition, unless the plaintiff subsequently waived it. If property is sold without credit on the condition that it shall be paid for, though it is delivered, the sale is conditional, and the title will not pass as between the original parties. (2 Kent, 496; Story on Sales, § 313.) The first instruction asked by the plaintiff and refused ought to have been given with the qualification "unless the jury should find that the plaintiff waived the condition." If the defendant obtained possession of the buggy on consideration and on the promise that he would pay for it, and there was no agreement for credit, the plaintiff's right to retake it did not depend on the motives of the defendant at the time of the delivery, if the conditions were not afterwards complied with. For the purchaser, to whom property is delivered coupled with the condition that he will pay for it, will be guilty of a fraud if he afterwards attempts to keep it without paying, although he intended to pay at the time he got it. The instructions therefore are erroneous which imply that it was necessary to show that the defendant obtained possession of the buggy with the intention never to pay for it, or that he procured the delivery thereof by a trick or contrivance.

The judgment will be reversed and the cause remanded; the other judges concurring.

Dessaunier v. Murphy.

DESSAUNIER *et al.*, Appellants, v. MURPHY, Respondent.

1. The doctrine of presuming conveyances rests mainly upon long and uninterrupted possession in the owners of the title in favor of which the presumption is indulged; if this possession be had, not under the title in favor of which such a presumption is invoked, but under another title not shown to be owned by the person so invoking it, a conveyance will not be presumed to supply the defect.

Appeal from St. Louis Land Court.

This case has heretofore been before the supreme court. For the report of the decision of the supreme court see Dessaunier v. Murphy, 22 Mo. 95. In addition to the facts in evidence on the former trial, Henry W. Williams was examined as a witness in behalf of defendant. He testified that since 1846, his business had been that of an investigator of titles to real estate in St. Louis; that during that time he had taken abstracts of all the archives and a large portion of the deeds in the office of the recorder; that he had met with references to judicial sales of which he could find no evidence except recitals in deeds. The plaintiff also introduced in evidence various deeds showing that A. L. Langham had acquired a portion of the Bizette title previous to 1818; also other evidence tending to show that Langham claimed title through Bizette.

The plaintiff requested the court to instruct the jury as follows: "The land in dispute was confirmed by act of Congress of the 29th of April, 1816, to be surveyed to the legal representatives of William Bizette; and if the jury find from the evidence that said land was purchased by Charles Bizette on the 18th of February, 1775, and that Charles Bizette died leaving three children his heirs, and that Louis Boissy married one of the daughters of said Charles Bizette, and that Boissy died leaving only five children his heirs; and that Emily Dessaunier and Louise Deroin, two of the plaintiffs, were children of said Boissy, and that Paschall Mallett, Louis Mallett, Francis Mallett, Charles Mallett, and Mallia

Dessaunier v. Murphy.

Mallett, and Maria Louise Deroin, the other plaintiffs, are the children of Margaret Boissy, the daughter of said Louise Boissy and Paschall Mallett her husband, and that said Margaret and her husband are dead, then the jury will find in favor of the plaintiff for three-thirtieths or one-tenth part of the land sued for." This instruction the court gave, having added to it the following clause: "Unless the jury find for the defendant under the instruction given for defendant."

The court, at the instance of the defendant, gave the following instruction: "If the jury believe from the evidence that after the death of Charles Bizette and before October 12, 1782, the land in controversy in this suit was sold to Joseph Brazeau as a part of the estate of said Bizette, under the authority of the government then in power in the county of St. Louis, they should find for the defendant. Such an authorized sale may be shown by circumstantial and indirect evidence as well as by direct evidence."

The jury found for defendant.

N. D. & G. P. Strong, and *Morehead*, for appellants.

I. The copy of the receipt should have been excluded. It does not purport to be an original but a copy. It does not describe any particular piece of land. There were three pieces of land mentioned as belonging to the estate of Charles Bizette. It does not purport to have been given to Joseph Brazeau. It does not purport that the money was paid at all. It simply discharges Brazeau. It does not purport to be for land of Charles Bizette. It is signed simply "mark of X Provenchere," without designating John B. Provenchere, and without the attestation of a witness or acknowledgment. Having this want of authenticity, being signed by an illiterate man, if signed at all, it speaks of dollars, a currency then utterly unknown in Missouri. It was irrelevant; it proves nothing. It derives no assistance from the face of the deed. The deed does not state when the money was paid. The deed is professedly founded on the receipt. Thirty years had elapsed since the assumed date of the transaction.

Dessaunier v. Murphy.

The heirs of Charles Bizette were more than thirty years of age. The deed does not purport to have been made by the authority of any court or government. In 1811 Provenchere was a mere stranger to the title.

II. Supposing the deed and receipt properly admitted in evidence, they furnish no evidence of any authorized sale of the land in dispute upon which the court was justified in submitting the fact to the jury.

III. The instruction given was erroneous.

Todd, for respondent.

I. There was evidence from which the jury might lawfully infer the existence of an authorized sale of the land in controversy to Joseph Brazeau after the death of Charles Bizette and prior to October, 1782. Perfect direct proof of the sale did not, it is true, exist. There was long continued, adverse, actual and highly public possession in constant view of most of the parties interested against the claim; this possession was for thirty-five years before the commencement of this suit, and in favor of this possession time had been running under the statute of limitations, against these plaintiffs and those under whom they claim, for nearly twenty years next before the commencement of this suit. This evidence is relied on only as corroborative of the other evidences in the case of an actual and lawful sale. 1st. The petition of widow Bizette for an inventory and sale of the property of the estate of Charles Bizette, deceased, her husband, for the purpose of paying debts and maintaining the children. 2d. The grant of the prayer, as shown by the proceedings of Gov. Cruzat. The inventory included this land. 3d. The appointment of Provenchere as curator of the infant children of Charles Bizette. 4th. The receipt of Provenchere to *Brazo* of October, 1782, with the deed of himself and wife, dated May, 1811. This deed shows that the land in controversy was sold to Brazeau at public sale at the church. The debts of C. Bizette required a sale of the property of his estate. Such a sale was legally authorized and begun as

Dessaunier v. Murphy.

early as September, 1781. Provenchere, as curator of the children, was entrusted with all the property not sold on the day of sale. He was authorized as curator to sell. (See White Recop. 16.) If he sold this land to Brazeau and Brazeau paid for it, said receipt, if genuine, would be a usual and proper evidence of the sale and voucher of payment, and its date would be a consistent fact; and if it was his duty to report the sale and to make a record of it, its non-production should not affect Brazeau's right as evidenced by the receipt, because Provenchere may have omitted to report. Provenchere may have reported and the record may now be lost, as Williams' evidence shows may have been the fact. If the receipt was genuine and made at the date of it, it should satisfy every mind that such a sale was made. The receipt was genuine. Its genuineness was a question for the jury. Mrs. Provenchere joined in the deed. If there had been a sale to Brazeau, she must have known it. If there was no such sale, Provenchere and his wife conspired to cheat their children. Brazeau conveyed to his nephews, in 1811, stating his title to be derived from said sale. The deed of the Brazeaus to Langham of the adjoining tract shows that they had already conveyed the Bizette tract to him. Since that time Langham and those claiming under him have been in possession of the land.

NAPTON, Judge, delivered the opinion of the court.

As we understand the facts of this case, it is not one in which a court could presume a conveyance or direct a jury to presume one. It does not fall within any class of cases in which such presumptions have been indulged. The presumption is invoked here not to sustain an ancient possession held under the title sought to be aided by the presumption, but to make out an outstanding title, adverse to that under which the defendants hold and under which the plaintiffs claim.

Langham took possession in 1818 under deeds from the heirs of Bizette. The Brazeau title derived through Proven-

chere, after being traced to the two nephews of Brazeau in 1811, disappears and no traces of it are seen afterwards. No possession had ever been held under it, beyond all doubt, up to this time, although nearly thirty years had elapsed. The first possession of the land since the death of Charles Bizette is found in Langham in 1818, under the Bizette title, and that possession has continued to the present day. The nephews of Brazeau, who held what is here termed the Brazeau title originally derived from Provenchere and conveyed to them by their uncle in 1811, conveyed to Langham an adjoining tract in 1818, and in referring to the tract now in controversy spoke of it as belonging to Langham. No allusion is made to their title to this tract in the deed. It would be a violent presumption to infer from this that they had previously made a conveyance to Langham, as it is perfectly easy to account for such language without making such an inference. Langham was in possession of the land by deeds under the Bizette title. The Brazeaus may have considered their title worthless. The recital that the adjoining tract belonged to Langham is just as true if Langham's title was derived from Bizette, as it would be if it had been derived from them. Besides, the recital, whatever it may imply, can not bind the present plaintiffs, who claim under the Bizette title, and are no way concerned in or affected by the deed from the Brazeaus for an adjoining tract of land. At all events no deed from the Brazeaus to Langham appears in this case, and neither the court nor jury were asked to presume one. We may assume, then, that no such deed existed, and consequently Langham derived no title to the premises in controversy from the Brazeaus.

The jury then in this case were permitted to infer from circumstances a valid sale of this land to Brazeau in 1782, not to protect a possession acquired under such sale, but to defend a possession acquired under the heirs of Bizette against a claim of one of the heirs.

The doctrine of presuming conveyances mainly rests upon long and uninterrupted possession in the owners of the title

Dessaunier v. Murphy.

in favor of which the presumption is indulged. Where a defendant in ejectment takes shelter under an outstanding title, as he may do, he must take it as he finds it, and it will be treated by the court as it would be if its owners were asserting it as plaintiffs. Could the Brazeaus or their representatives claim the assistance of presumption in a suit against the present defendants? If they could not, then the defendants, resorting to it for protection, can not strengthen it or cure its defects by connecting with it their *possession under another* and adverse title.

So far as mere presumptions of fact are concerned, they would seem to be rather against the validity of the title of Brazeau, if we consider the acts of those who hold this title as entitled to much weight in determining its value. No possession was ever taken under it by any one. The Provencheres—both father and son—and Langham and the Brazeaus did not appear to regard the title as valuable from 1811 up to 1818. Langham was busy in buying up branches of the Bizette title, and did not think it worth while to buy the Brazeau title to this tract, although he must have been aware of it by his purchase of an adjoining tract, the title of which had the same origin and the same owners. It would seem that John L. Provenchere had no confidence in the Brazeau title, since it was through him that Langham derived a portion of the Bizette title. Provenchere could hardly be ignorant of the existence and character of the Brazeau title, as it originated in a supposed sale made by his father. If indeed we could presume that Langham, in 1818, when he went into possession of this land, had previously acquired a conveyance from the two Brazeaus, the case would present entirely another aspect. But the case was not tried upon any such hypothesis. The jury did not pass upon any such fact. We must suppose that no such deed existed, as no such deed was shown, and no reference to any such deed is to be found in any of the conveyances made of this land or their recitals. The deed of 1811, from Provenchere to Brazeau, is certainly evidence to show that at that date Brazeau

considered his purchase available, yet he immediately transferred the title to his nephews and they never took possession. Nothing further is ever heard of it in all the subsequent acquisitions of title by Langham to this and adjoining tracts of land, in all of which the Provencheres and Brazeaus were concerned. This title is now resuscitated, after a lapse of nearly forty years, to protect the interest of those who hold under the Bizette title, but who it seems did not acquire the whole title. v

We do not wish to be understood as asserting that an owner or claimant of land prejudices his title by buying up outstanding claims. Such purchases are common and altogether commendable, and ought not to create any prejudice against the title which proves to be available. If Langham had been the owner of the Brazeau title, his subsequent purchase from the heirs of Bizette ought not to have any influence in impairing the value of his original title. But we have seen that Langham and his assignees do not occupy this position.

We concede the force of the reasoning by which the counsel for the defendant has maintained the genuineness of the receipt of 1782. The argument was certainly ingenious, perhaps conclusive. We think the paper was a genuine one and that the jury were well warranted in coming to this conclusion; but it is not pretended that this paper alone makes out a valid sale in 1782 to Joseph Brazeau. If a possession had been taken under this receipt or the deed following it, then a court or jury might well be permitted to presume that every thing necessary under the law to be done towards passing the title to Brazeau had been done. Every legal presumption will be made to sustain long and ancient possession, but the possession must go along with the title whose deficiencies are sought to be covered up. As neither the defendants nor those from whom they derived title and possession ever held under the title they now seek to set up, they have no other protection against the claim as-

Clark v. Hammerle.

serted in this case except such as their possession under the statute of limitations gives them.

As the case was not tried upon this defence of limitation, we have not looked into the facts with any view to see what result would be produced by the statute of limitations. We shall therefore reverse the judgment and remand the cause; the other judges concur.

CLARK, Respondent, v. HAMMERLE *et al.*, Appellants.

1. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof.
2. Where an instruction given at the instance of a party to a suit is decisive thereof and excludes from the consideration of the jury the questions raised by the evidence of the opposing party, it is erroneous.
3. Hunt's minutes of testimony taken under the act of congress of May 26, 1824, are not admissible in evidence except to prove such facts as can be proved by hearsay; where, however, one party to a suit introduces them in evidence, the opposing party may have the full benefit of them.
4. A certificate of confirmation issued in 1825 by Recorder Hunt, under the act of congress of May 26, 1824, in favor of Joachim Roy's representatives, for a lot in the Cul de Sac, described the lot confirmed as bounded north by a field lot of A. Guion, and east by Auguste Chouteau's mill tract. On the margin of the claim of A. Guion are the following words: "In Chouteau's mill tract." *Held*, that this marginal entry was not admissible in evidence, as against those claiming under Roy, to show that the lot confirmed to Roy was situate within Chouteau's mill tract. The Spanish survey of "Chouteau's mill tract," in which the land on the west of the survey is stated to be "vacante," is admissible in evidence as bearing upon the question of the location of Roy's confirmation; the same weight should be attached to it as to reputation or hearsay in establishing ancient boundaries.

Appeal from St. Louis Land Court.

This was an action of ejectment to recover possession of a portion of a lot in the Cul de Sac common field near St. Louis.

Clark v. Hammerle.

Plaintiffs claim title under the legal representatives of Joachim Roy, to whom they allege the lot was confirmed by act of Congress of June 13, 1812. The defendants, in addition to a formal denial of the facts stated in the petition, set up the statute of limitations as a bar.

In support of his title plaintiff introduced in evidence a certificate of confirmation by Theodore Hunt, under act of Congress of May 26, 1824, with Hunt's minutes of testimony. Hunt's minutes of testimony were, as certified, in substance as follows :

" Joachim Roy's legal representatives claim a lot in the Cul de Sac, near the town of St. Louis, containing one arpent and a half in front by about forty in depth ; bounded north by the field lot formerly owned by Madame Lacompte, east by the claim of widow Camp's legal representatives, south by the field lot formerly owned by Tabot, and west by land unknown, near to Gratiot's." [Here follows the testimony of Michael Marly and Joseph Roy, who testified in substance that Joachim Roy owned and cultivated the lot claimed about thirty-two years before July 8, 1825, (the day the testimony was taken) until the common field fence was taken down.]

" Francis Caillou, being duly sworn, says : He knows the lot claimed ; that this deponent, forty years ago, with Joachim Roy, cultivated *this* field lot, and continued to cultivate the same with said Roy until the fence was taken down some twenty-five or twenty-six years ago. This deponent says, that his mother after the death of his father married Joachim Roy, and in that way, living with Roy, he became acquainted with this field lot. *He has no interest in this claim whatever.*" " Eustache Caillou, being duly sworn says : He knows the field lot claimed, and that upwards of thirty years this lot was owned and cultivated by Joachim Roy, who cultivated the same until the fence was taken down ; and this deponent further says, *he has no interest whatever in this field lot, neither directly nor indirectly.*"

The above is recorded on pages 49 and 50 of Hunt's Minutes, book No. 2.

Clark v. Hammerle.

"Joachim Roy's legal representatives claim a common field lot in the Cul de Sac, containing one arpent and a half in front by about thirty in depth; bounded north by the field lot claimed by Amable Guyon's legal representatives, south by Beré Tabeau's legal representatives, east by Auguste Chouteau's mill tract, and west by Charles Gratiot." In support of this claim there is recorded the testimony of Baptiste Riviere, René Dodier, and René Paul. "Baptiste Riviere, being duly sworn, says: He knows the field lot claimed, and that upwards of forty years ago this field lot was owned and cultivated by Cadet Jean Rion, who cultivated the same until he died; and after that Fife Beaugeneau cultivated the same until it became the property of Joachim Roy, who owned and cultivated the same until the common field fence was taken down." Record of this testimony is made in book 2, page 116, of Hunt's Minutes. The testimony was taken and recorded July 30, 1825.

To the above one certificate was appended by the recorder of land titles.

The plaintiff then introduced in evidence a certified copy from Hunt's list of confirmation certificates issued under the act of Congress of May 26, 1824, to Joachim Roy's legal representatives. From this it appears that the certificate was issued July 30, 1825. The lot is described as a common field lot situate in the Cul de Sac, "one and one-half arpens front by about thirty deep;" "bounded north by the field lot claimed by Amable Guion's legal representatives, south by the field lot claimed by Beré Tabeau's legal representatives, east by Auguste Chouteau's mill tract, and west by Charles Gratiot."

In the recorder's certificate appended to his transcript of the above it is stated that "the above is the only entry in the said list of the claim of said Roy's representatives to a lot in the Cul de Sac common field of St. Louis."

The plaintiff then offered in evidence a document purporting to be a will of Joachim Roy, devising all his estate to Verronique Guitard. The will bore date March 25, 1789,

Clark v. Hammerle.

and purported to be signed by Joachim Roy, by his mark, and by seven witnesses, and by Manuel Perez, lieutenant governor. This document was a copy certified from the "archives" by the recorder of St. Louis. In connection with this certified copy the plaintiff offered in evidence two documents, one purporting to be the original will of said Roy, of which the above is a copy, and the other purporting to be a copy thereof certified by Charles Dehault Delassus to be "a copy in conformity to the original which is deposited in the archives of the government, given to the party on his application. Given at St. Louis, July 24th, 1801. [Signed] Delassus."

Defendants objected to the admission of these documents because the will was not executed in accordance with the law then in force; because it was not proved; because it had never been acted upon or set up in any manner by any person; because the devisees therein named never claimed any thing under it, nor was it ever produced before any judge or officer; because said copies were not produced from any legal custody. It was admitted that Roy died June 25, 1801. The court overruled the objections and admitted the will and copies in evidence.

Plaintiff then introduced in evidence a will of Verronique Guitard executed August 29, 1808, by which the lot in controversy was devised to her sons, François Caillou and Eustache Caillou. This will was proved November 22, 1836; also a deed to Wm. Carr Lane, dated August 1, 1825, from Eustache and François Caillou. Plaintiff showed title in himself under Lane to that portion of the field lot which is in controversy. This portion lies at or near the west end of the field lot. The plaintiff then gave in evidence certified copies of two surveys. The first purported to be a "plat and description of a survey of a lot, one and one-half by about thirty arpens, in the Cul de Sac fields, claimed by the legal representatives of Joachim Roy, and the boundaries and extent thereof proven before the recorder of land titles on the — day of —, 1825, under the act of Congress of the

26th of May, 1825." This survey (No. 3307) was approved by the surveyor general, Milburn, in 1841, with the qualification, written on the margin, that its "southern boundary must be extended eastward so as to make its whole length forty arpens, unless it comes in contact with the claim of Motard, in which event it will stop at Motard's." The second survey (No. 3307) was made in accordance with this suggestion. It was approved March 20, 1857. The land in controversy was embraced in this survey. The plaintiff then gave in evidence a certificate of confirmation to Joachim Roy's legal representatives for the Cul de Sac lot as thus confirmed. This certificate bears date March 25, 1857.

The plaintiff here closed; whereupon the defendants asked the following instructions: "1. Upon the case made in testimony the plaintiff ought not to recover. 2. The will of Joachim Roy, as given in evidence by the plaintiff, is inoperative and void as a conveyance of the land in question to Verronique Guitard. 3. The two surveys, as given in evidence by the plaintiff, are not authorized surveys of the United States; and neither of them is authoritative as a survey." The court refused to give these instructions.

The defendants then introduced oral testimony with the view to show that the true location of the Cul de Sac was within the Chouteau mill tract; that the Cul de Sac had been improperly located west of said mill tract. To this testimony plaintiff objected.

The defendants offered in evidence a copy of a plat of survey of the Chouteau mill tract. The ground on the west of the mill tract is laid down as "vacante." The "second concession" is marked as commencing at the end of the common field lots of the old town. To this plat there is the following annotation: "Mesurée par le Lnt. Arpenteur, Don Santiago McKay, en date du 29 May, 1803, en vertu de la requête de l'interessé en date du 17 Fevrier de la même année du decret de Mons. le Lnt. Gen. Don Charles Dehault Delassus, du 18 du même mois, même année, à laquelle est jointe; le plan figuratif de la dite terre et toute les pieces citées dans

Clark v. Hammerle.

la dite requête numérotée lesquelles j'ai remis à l'intéressé avec le certificat d'arpentage que j'ai expédié le 23 d'Aout, 1803." The court admitted said survey against the objection of plaintiff.

The defendants then offered in evidence, among other documents, the following: 1. Claim and certificate of confirmation by Hunt, dated 30th July, 1825, to A. Guion, for lot in Cul de Sac, of two by thirty arpens; bounded north by Verdon, south by 'Cadet Jean Rion,' east by the Mill tract of Auguste Chouteau, and west by the claim of Charles Gratiot. On the margin of this claim are the following words: 'In Chouteau's mill tract.' 2. Survey No. 2973, in favor of A. Guion or his legal representatives. 3. Claim by Berry Tabeau's legal representatives for one by forty arpens; bounded north by field lot claimed by Jean Rion's legal representatives. The court, on the motion of plaintiff, excluded the same.

The defendants then introduced in evidence a certified copy of the claim, &c., of J. Roy, "with the erasures." From this it appeared that the claim, as set out on page 116 of "Hunt's minutes" (see ante, p. 57) was erased and interlined as follows: The words "Cadet Jean Rion's" as claimant were erased, and "Joachim Roy's" legal representatives were inserted. The word "forty" was erased and the words "about thirty" were interlined. In what is called Hunt's list of certificates of confirmation, the words "Cadet Jean Rion" as confirmee were erased, and that of "Joachim Roy" was interlined.

Defendants claimed title under a New Madrid certificate located June 16, 1818. Other facts were adduced in evidence. It is deemed unnecessary to set them forth. The court gave the following instructions at the instance of the plaintiff: "1. The survey made by the government of the United States of the tract of land confirmed to Joachim Roy or his legal representatives is *prima facie* evidence of its true location; and if the jury find from the evidence that the premises sued for in this case are within the survey No. 3307,

Clark v. Hammerle.

read in evidence ; that the defendant Hammerle was in possession thereof at the time this suit was instituted ; if the wills of Joachim Roy and Verronique Guitard and the deeds read in evidence by the plaintiff are genuine ; if the persons named in the depositions of Robert Willis and Sarah Brammell are the heirs of Samuel Brammell, deceased,—then the plaintiff is entitled to recover and the jury should find accordingly. 2. The burthen of proving that the location of the Joachim Roy tract by the United States survey No. 3307 is erroneous rests on the defendants, and, unless they have shown in evidence to the satisfaction of the jury that said location is improperly or erroneously made, the jury should stand by the location made by said survey. 3. Under the act of Congress approved on the 17th day of February, 1815, a New Madrid certificate could only be located on lands belonging to the United States, the sale of which was authorized by law ; and if the land sued for in this action was a part of the tract or parcel of land that was cultivated, claimed or possessed by Joachim Roy prior to the 20th day of December, 1803, then the New Madrid location under certificate No. 150, read in evidence, was not authorized by law and has no effect. 4. If the jury find for the plaintiff, they should assess his damages at the yearly value of the rents and profits of the premises in question, from the 16th day of September, 1856, to date, and should also fix the monthly value of such rents and profits at this time."

The court gave the following at the instance of defendants : " 5. The documents given in evidence by the plaintiff are presumptive evidence only in law, that the land in dispute was inhabited, cultivated and possessed by Joachim Roy prior to 20th December, 1803 ; and therefore if the jury find from the other evidence in the cause that the lot claimed by Joachim Roy in the Cul de Sac common field was at another and different place, and did not embrace any portion of the land in dispute, and that said Roy did not inhabit, possess or cultivate any portion of said premises in dispute prior to 20th December, 1803, they will find for the defendants."

The following instructions asked by the defendants were refused: "As to the will of Joachim Roy, as given in evidence by the plaintiff, the court instructs the jury as follows:

"1. If the said Joachim Roy died before transfer of Louisiana to the United States, the law required that the will, in order to be valid as a conveyance of title, should be produced before a public tribunal or officer, and proved or otherwise recognized as the will of the deceased; that the heirs or others claiming under the will should make their election whether they would or would not take under the will; and if they elected to take under the will, they should make before the tribunal or officer an inventory of the estate. 2. If said Roy died after the transfer of the country to the United States, the law required that the will should be probated by the public authority before it could be operative as a will conveying property. 3. There is no evidence before the jury tending to prove that said will, after the death of said Roy, and before the change of government, was ever produced before any tribunal or officer and proved or otherwise recognized as the will of said Roy; that the constituted heir ever set up or recognized the will by accepting or rejecting its provisions; or that any inventory was ever made of the estate. Therefore, under the Spanish law of the province, the will is inoperative and void as a conveyance of the land in question."

"As to the confirmation and survey: 1. The confirmation to the representatives of Joachim Roy, given in evidence by the plaintiff, is by the act of Congress of 1812, and the supplemental act of 1824, and as no such survey thereof was provided for by law none was legally necessary to the support of the rights of the confirmer. 2. The two surveys thereof given in evidence by the plaintiff are at most only *prima facie* evidence of the true locality and not conclusive. 3. As to the last of the two surveys, if it be for a larger quantity of land than by the evidence before the jury appears to have been confirmed, it was made without authority and ought to be rejected. 4. As to the certificate of confirmation given in

Clark v. Hammerle.

evidence, dated 24th March, 1857, is no evidence that the land therein mentioned had been *lawfully surveyed*, as is stated in said certificate. 5. Inasmuch as there is no evidence in this cause that the will of Roy, dated 28th March, 1798, was ever proved, or any official action had thereon, or that the devisee therein named ever appeared before any tribunal or officer to accept or reject the devise, that no inventory was ever made or any administration had upon his estate; and inasmuch as it does appear that the said will remained dormant in the archives for more than twenty years after the death of said Roy, and that the devisee and her representatives therein named during all that time failed to treat said will as valid, or to set up any claim under it, and acted in regard to the estate of said Roy as though he had died intestate; and that Eustache and Francis Cayou appeared before the recorder of land titles in 1825, and expressly disclaimed under oath having any interest directly or indirectly in said premises, the jury are instructed that the evidence is not sufficient to entitle the plaintiff to recover, provided the jury find that Roy died in 1801, and that the disclaimer of said Francis and Eustache was made prior to the execution of their deed to Lane, and while they were the representatives of any claim of Verronique Guitard to the premises in dispute under said will. 6. If the jury find from the evidence that Joachim Roy did not inhabit, cultivate or possess any portion of the premises embraced within the United States survey No. 3307, for several years prior to his death; that said Roy died in 1801; that no inventory was ever made of, nor administration ever had on his estate; that Guitard, the universal devisee in the will of Roy, dated 28th March, 1789, survived him for several years, and that both said devisee and her representatives acted in regard to the estate of said Roy for more than twenty-four years after his death as though he had died intestate, and during all that time neither treated said will as valid, nor set up any claim under it to any property whatever, nor ever appeared before any officer or tribunal to accept or reject the devise therein

Clark v. Hammerle.

made; that said will was never proved, nor any official action had thereon, and had remained dormant in the archives for more than twenty years after the death of said Roy; and if the jury further find that Francis and Eustache Cayou, in July, 1825, prior to the execution of their deed to Lane, disclaimed under oath having any interest directly or indirectly in said premises, they will find for the defendants. 7. If the jury find from the evidence, (in the absence of proof of any grant, survey or permission to Roy or any other person to occupy the premises in dispute under the Spanish government,) that J. Roy ceased to cultivate or possess the land in question several years prior to the change of government in 1803, and also several years prior to his death, and that neither said Roy nor his representatives inhabited, possessed or cultivated said premises for more than twenty-five years from the time said Roy so ceased to cultivate said premises, and that neither said Roy nor his representatives set up any claim to said premises until the year 1825; and that Francis and Eustache Cayou appeared before the recorder of land titles in 1825, and under oath disclaimed having any interest directly or indirectly in said premises, and that such disclaimer was prior to the execution of the deed of said Francis and Eustache to Wm. C. Lane; and if the jury further find that the land in dispute from the time Roy ceased to cultivate the same until the year 1825, was of little or no value, they will be well warranted in finding for the defendants on the ground that Roy and his representatives had abandoned said premises. The jury are instructed that there is no evidence that the paper purporting to be a copy of the will of Joachim Roy ever formed a part of the archives of the French or Spanish government, or that the same is a copy of any genuine document, and the jury ought to disregard it. 8. If the jury find from the evidence that Cadet Jean Rion or his representatives appeared before the recorder of land titles in 1825, and claimed the same premises embraced in the United States survey No. 3307, and that a certificate of confirmation therefor was made by said recorder to said Rion

Clark v. Hammerle.

or his representatives, and that subsequently the name of said Rion was erased and the name of Joachim Roy inserted in both said claim and certificate, and that the plaintiff claims under Joachim Roy by virtue of the certificate as thus altered, they will find for the defendants. 9. There is no evidence before the jury tending to prove that said will since the change of government was ever probated, or that it was ever set up and attempted to be maintained as the will of Roy before any judicial tribunal or officer. Therefore, under the American law of the territory and state, the will is inoperative and void as a conveyance of the land in question."

Verdict was given for plaintiff and judgment rendered accordingly.

Bates, Gamble and Gibson, for appellants.

I. The extract from the registry of certificates is, at best, only *prima facie* evidence of title. It is no evidence of any thing but what is expressed on its face. The "registry" does not seem to be the "list" which the act of 1824 directs the recorder to send to the surveyor. The certificate of confirmation issued March 24, 1857, ought not to have been received in evidence. The only certificate authorized by law had been issued long before. This was a second certificate not authorized by any law. It contains matter which the recorder was not competent to certify. He had nothing to do with the surveys. His only lawful action necessarily precedes the survey. No survey was required by law nor needed in fact. The act of 1812 does not require the lots thereby confirmed to be surveyed; nor does the supplementary act of 1824.

II. The will of Joachim Roy ought to have been rejected. It is not a valid will by either Spanish or American law. (2 Partidas, p. 1018, Law 11; p. 1014, Laws 4 & 5.) It was not proved nor set up and used as a will in Spanish times by either of the parties in interest or by any officer of government. The heir may renounce. (*Id.* Law 13, &c.) The Spanish law was not complied with. No inventory was made and no property claimed under it. It remained dormant for

Clark v. Hammerle.

thirty-six years after its date, and twenty-four years after the death of the testator. It was never probated. (Meegan v. Boyle, 19 How. 130.) The very beginning of our territorial legislation recognizes the preëxisting state of the law on this point. (1 Terr. Laws, p. 31-33, 131-2.) If valid as a will, still it did not convey this land. Roy died in 1801, showing no grant, permit or survey. His title, if he had any, was begun and completed in 1812, and therefore could not pass by the will.

III. The locality of the ground as surveyed is wrong. The two surveys (with one number, 3307), if otherwise lawful, contradict and annul each other. The testimony shows plainly that the actual cultivation of Roy was at another place.

IV. If Roy ever had any right it was abandoned. He never had a better claim than a naked possession, and that he ceased to have for many years before his death. No pretensions were set up in his name till twenty-four years after his death, and then his claim is proved up by two men who had the best means of knowing what and where he cultivated, and they place it far from the present location. They swear that they had no interest in the land, though they sell it a few days afterwards.

V. The court erred in excluding the plat of Chouteau's mill tract, and the confirmation of A. Guyon with the recorder's note that it was in the mill tract.

VI. The first instruction given for plaintiff, taken alone, is plainly erroneous. It begins by declaring Roy's survey *prima facie* evidence of true location, and ends by making it conclusive. It is not cured by the second instruction. The third instruction relative to the New Madrid location is erroneous and calculated to mislead. Any question of abandonment was entirely cut off, so that the jury were substantially forbidden to consider the evidence with respect to it.

Krum & Harding, for respondent.

I. Hunt's minutes, the registry of confirmation and the survey approved by Milburn in 1841, established, *prima facie*,

Clark v. Hammerle.

the fact that Joachim Roy inhabited, cultivated or possessed the land in question prior to December 20, 1803. (Joyal v. Rippey, 19 Mo. 660 ; Soulard v. Allen, 18 Mo. 590 ; 11 Mo. 25 ; 21 Mo. 243 ; 15 Mo. 80.) These were questions for the jury. The court will not disturb the verdict on the ground that it is against the weight of evidence. (Fine v. Public Schools, 23 Mo. 570.) The weight of evidence is on the side of the plaintiff. Roy's lot was correctly located.

II. The court properly admitted the will of Joachim Roy. It was an ancient document and was executed according to the requirements of the Spanish law. (White's Recop. 104 ; 3 Mart. O. S. 115-6.) It was in the most natural and proper custody when produced, that of W. C. Lane, who, once owning the whole tract, had subdivided and sold it in parcels. There was evidence proving, *prima facie*, the possession by Roy of the land devised, and of modern user by the party who had the custody of the will at the time of trial. (1 Greenl. Ev. § 21, 141, 144, 570.) Its authenticity was further shown by the copy made and certified by Delassus. The case of Meegan v. Boyle, 19 How. 130, is not in point. There was the requisite number of witnesses ; there was no condition in Roy's will ; there is no evidence showing that Roy's devisee renounced, but there is evidence tending to show an acceptance. It appears affirmatively that Roy had no child or children, and it does not appear that he had any heirs ; consequently, he did not disinherit any one. The rules prescribed by the law with reference to the probate, &c., of will were complied with as far as possible. It was deposited among the archives. (McNair v. Hunt, 5 Mo. 300 ; Charlotte v. Chouteau, 21 Mo. 590.) Roy's will did not remain "dormant;" it was acted on by his devisee in 1808 and her heirs in 1825. There was no administration on Roy's estate. There was no necessity for Roy's devisee or her heirs to assert rights which none disputed. The will of Roy is valid on its face. It contains every essential requirement of the law ; it was treated as valid by the devisee and never questioned by any one until the present time. (White's Rec. 104 et

Clark v. Hammerle.

seq.; see 2 How. U. S. 335; 19 Mo. 221; 5 Mo. 300; 2 La. Ann. 503; 3 La. Ann. 146.) Even if, subsequently to the death of Roy, his devisee or executrix failed to take steps required by the Spanish law, the will was not annulled by such failure. This would only give the heir at law an opportunity to avoid the will so far as to enable him to claim his distributive or heritable share of the estate. If he acquiesced, no stranger could take advantage of the failure. (White Recop. 116; *Charlotte v. Chouteau*, 21 Mo. 590.)

III. The court properly excluded the survey of the Chouteau mill tract made by Mackay in May, 1803; also the Guion and Tabeau surveys and confirmations; also the testimony of the witness, called after plaintiff closed his rebutting testimony, to cumulate testimony upon the question of the location of MacRee's house, after having previously examined a witness fully on that point and the rebutting testimony not touching the point.

IV. The court did not err in giving or refusing instructions.

SCOTT, Judge, delivered the opinion of the court.

The most important question in this cause grows out of the will of Joachim Roy made in March, 1789. The will was executed in the presence of the lieutenant governor of the province (in default of a notary), and was attested by seven witnesses, together with the lieutenant governor. The will, it seems, was deposited among the archives of the Spanish government, and a copy of it was given out by the governor on the 24th of July, 1801, a few months after the death of the testator. Whether this was a valid instrument without further proof under the Spanish law is the question now submitted.

By the common law a will of real estate was not proved in a probate court like a will of personalty. No probate was necessary to a will devising real estate. Indeed the probate courts in England had no authority to take the proof of such

Clark v. Hammerle.

wills. A will of the realty, when offered in evidence, was proved like a deed by the subscribing witnesses thereto, and presumptions in proof of ancient wills were indulged as in case of deeds.

Under the Spanish law there were several kinds or species of wills. (Febrero, Libro 1, tit. 8, § 2.) The will involved in this litigation was under that law denominated an open or nuncupative one. A nuncupative will might be made with or without the assistance of a notary. (Civil Code of La. art. 1571 and 1574.) Nuncupative wills received by public acts were not required to be proved. Their execution might be ordered; they were full proof of themselves, unless they were alleged to be forged. (Art. C. C. 1640.) It may be said that the civil code is composed of legislative enactments and is not evidence of what the Spanish law was, as that law may have been changed by the legislature in adopting it into the code. But the Spanish law is the substratum of the code, just as the common law is of the legislation of this state. An annotation on the 32 law, tit. 16, Partidas 3, shows that the law of the code is in conformity to the Spanish law. That annotation says that when a will is made without the authority (autorizacion) of the notary, the testament must be proved by the witnesses; clearly intimating that, if made in his presence and by his authority, no such proof would be required. To the same effect is note 4, law 3, tit. 2, Partidas 6. All the law cited from the Partidas in relation to testaments in the case of Meegan v. Boyle, 19 How. 149, concerns mystic or sealed wills, a will of a different species from that now under consideration; and by the Spanish law, as well as by the code of Louisiana, each species has its particular mode of authentication and proof, the law sustaining the will, though intended for one species and failing under it, provided it can be maintained as valid under any other species. It is only necessary to turn to the second volume of the translated Partidas, at the beginning of the second title, p. 975, to be satisfied that the law cited in the foregoing opinion relates to secret wills, the manner of making which

may be seen by reference to pages 962 and '3 of the same volume, and to Febrero, tit. 8, § 6. In confirmation of all this, we find that the wills made here under the Spanish government were executed with the assistance of a notary or of some one deputed by the chief officer of the province or of that officer himself, and were left among the archives of the government, just as by the Spanish law wills received by public act were left in the offices (*escribanias*) of the notaries. We find no evidence that proof was ever made of such instruments, but that copies of them as public acts were delivered to the interested. Having intimated our opinion on this subject, if we have mistaken the Spanish law we can easily be corrected by reference to the learned in that law residing in our sister state, whose code has been used on this occasion.

In the trial of causes neither party is bound to ask instructions. If they are not asked, the giving them or not is at the discretion of the court. If instructions are asked on the whole case or of any particular matter arising out of it, which the court refuses, it is not bound afterwards to give instructions of its own as substitutes for those refused. If erroneous instructions are asked and refused, it is entirely at the option of the judge whether he will afterwards give any or not. A party therefore who asks an instruction on the whole case must not frame it so as to exclude from the consideration of the jury the points raised by the evidence of his adversary. If a suit is on a bond for the payment of money, and the defendant gives evidence tending to show that he has paid it, it would not be proper for the court, at the instance of the plaintiff, to instruct the jury that if they believed that the defendant executed the bond, they will find for the plaintiff. Such instruction would be erroneous, as it would exclude from the jury all consideration of the question of payment. It is no answer to this to say that the defendant might have asked instructions. He was not bound to do so, and it was at the peril of the plaintiff to ask instructions disposing of the whole case which excluded from the jury the consideration of the evidence of the defendant's tending

Clark v. Hammerle.

to show that he had no right to recover. We do not see how the depositions of the witnesses accompanying the record of the confirmation of the recorder are evidence of the facts stated in them. How they can be evidence at all except as to such matters as may be proved by hearsay it is difficult to say. This court has refused to reverse judgments in cases wherein they were read, not because they were regarded as any evidence of the facts stated in them; but because they might be admissible for some purposes, and being so it was the business of the opposite party to call upon the court to declare their effect in evidence. When reading the record as mere evidence of a confirmation, they should not be read. A record of a judgment is read in evidence; would the depositions embodied in the bill of exceptions be read, or could they be evidence? (*Toney v. City of St. Louis*, 21 Mo. 243; *Soulard v. Clark*, 19 Mo. 570.) If the original deposition was produced and the hand-writing of the witness proved, it would be evidence against him. But the plaintiff himself used such evidence, and it was of course open to the defendant, and they had a right to the full benefit of it. Under this view the depositions of the two Cailloux were evidence of an abandonment or of the non-existence of a claim on their part to the land in controversy. Whether the lot of which they spoke was the lot in controversy or another lot was for the jury to determine from the evidence. The defendants being so unfortunate as to have all their instructions on the subject of abandonment rejected by the court, the court was not therefore warranted in putting the case to the jury in such a way as would exclude the consideration of the effect of the evidence given by them on the subject of abandonment.

As the defendants had the benefit of the claim of J. Roy with the erasures in evidence, and as such evidence was of a tendency to throw doubt and mistrust on the claim of Roy, the claims of Guion and Tabeau, as they refer to Rion, were of some influence in strengthening the weight of the evidence of the erased entry. Certainly those papers mutu-

Clark v. Hammerle.

ally strengthen and support each other as evidence for the defendant. We are not aware of any principle which would make the writing on the margin opposite the confirmation of Guion as it stands on the record any evidence whatever, except in a criminal prosecution against him who made it. We know no law nor practice which warrants any such thing, and nothing would prove more dangerous to titles passing through that office than the giving the least sanction to such evidence.

The survey of Chouteau was evidence on the ground that, it being a call in the description of the boundaries of the lot in dispute as well as of those by which it was bounded, it was proper in locating the lot in dispute, the proper location of which was one of the matters in controversy. We do not regard the annotations on the plat of the survey in the light of the unauthorized writings on the margin of the recorder's confirmations or claims. This survey is an ancient document. It is found among the Spanish archives. Its authenticity is not questioned. Under such circumstances it seems that on principle it would have the weight given to reputation or hearsay in establishing ancient boundaries.

There was no error in admitting in evidence the certificate of the recorder. (*Soulard v. Allen*, 18 Mo. 590; *McLott v. Dubriel*, 9 Mo. —.) The first section of the act of 29th April, 1816, providing for an appointment of a surveyor of the public lands in Illinois and Missouri territories, made it the duty of the said surveyor to survey all lands the claims to which had been or should thereafter be confirmed which had not already been confirmed.

There was no error in refusing the instructions asked by the defendants. Almost all those instructions contained matter relative to the will which is hostile to the views of the law herein expressed, and were therefore properly overruled.

The instruction relative to the alteration of a confirmation was properly refused, because it assumed as a matter of law that the alteration would defeat the right of those claiming under Roy, when Roy had a confirmation independent of that

Coons v. North.

which was altered. The whole matter with all its circumstances was a proper one for the consideration of the jury on the trial of the issues submitted.

We see no ground whatever for the refusal of the court to hear the evidence offered by the defendants after the plaintiff had given evidence in rebuttal. (*Rucker v. Ewing*, 7 Mo. 115.) The judgment is reversed and the cause remanded. The other judges concur.

COONS *et al.*, Respondents, v. NORTH, Appellant.

1. One A. B., being indebted to C. D. in the sum of \$538.96, conveyed a certain tract of land to E. F. in trust to secure the payment thereof. In said deed the land, situate in St. Louis county, was described as follows: "A tract of eighty acres of land in the northern end of survey number 369, confirmed to Samuel Smith, in township 45 north, of range 4 east, commencing, &c., [here follows a description by metes and bounds] and being all the land now owned by said A. B. within said survey No. 369." Default being made in the payment of the indebtedness secured, the trustee proceeded, at the request of C. D. and in accordance with the provisions of the trust deed, to advertise and sell the land. In his advertisement he described the land to be sold by copying the description in the deed of trust. On the day of sale the trustee proceeded to sell; the advertisement was first read, and the land was offered for sale as a tract containing eighty acres, more or less. Bids were asked by the acre for the whole tract. One G. H. was the highest bidder at the price of \$8.50 per acre, and the tract was struck off to him at that price, and the trustee gave him a memorandum of said purchase, stating that he, G. H., had become "the purchaser of said land at and for the price of eight dollars and fifty cents per acre, and had paid on his purchase \$500." The trustee paid over the said \$500 to C. D., and it was credited upon the debt. The tract was subsequently surveyed and was found to contain only twenty-three acres. During these transactions none of the parties thereto supposed that the tract contained less than eighty acres. *Held*, in a suit instituted by G. H., the purchaser, against C. D. to recover back the excess of said \$500 over and above the sum that twenty-three acres would have amounted to at \$8.50 per acre, 1st, that the sale by the trustee was not, properly considered, a sale by the acre, but a sale of the tract as a tract; 2d, that the purchaser, having bought the tract as containing eighty acres, could not recover of the *cestui que trust* or creditor the excess sued for; 3d, that he was entitled on the ground of mistake to have the sale set aside.

Appeal from St. Louis Court of Common Pleas.

This was an action by Andrew J. Coons and Isaiah C. Brown against William North, to recover money paid by mistake. The court found the facts as follows: "George Smith, on the 14th of November, 1851, executed the deed of trust in plaintiff's petition described for the purpose of securing to the defendant the payment of the sum of \$538.96. Default having been made in the payment of said sum when the same became due, the trustee named in said deed, William S. Brown, at the request of defendant and pursuant to the provisions of said deed, advertised the land described in said deed for sale by inserting for more than twenty days in the Missouri Republican, printed and published in St. Louis city and county, an advertisement of said sale, to be held at the north front door of the court-house, in said city, on the 16th day of May, 1853. The description of the tract in this advertisement is the same as in the deed of trust; it is as follows: "A certain tract of land situate in the county of St. Louis and state of Missouri, described as follows: being a tract of eighty acres of land in the north end of survey No. 369, confirmed to Samuel Smith, in township 45 north, of range 4 east, commencing at John W. Smith's corner on Creve Cœur creek; thence along his line south until intersecting Samuel Smith's line; thence west along Samuel Smith's line to the west line of the original survey; thence north along said original line until it intersects Creve Cœur creek; thence down the creek to the place of beginning; bounded north by Creve Cœur creek, east by land of John W. Smith, south by land of Samuel Smith, and west by land of Samuel Conway, and being all the land now owned by said George Smith within said survey number 369." On said day and at said place, pursuant to said advertisement, said trustee proceeded to sell said land. The advertisement having been first read, it having been announced that said land contained eighty acres, more or less, bids were asked by the acre for the whole tract. Several persons present declined

bidding, because it was uncertain how many acres there were in the tract. The plaintiffs were the highest bidders at the price of \$8.50 per acre. The tract is situate about twenty miles distant from St. Louis. The plaintiffs and the trustee and defendant supposed at the time that the tract contained eighty acres. Thereupon the plaintiffs paid to the said trustee the sum of \$500 on said purchase, and said trustee executed and delivered to them the following memorandum of said purchase: 'I, William S. Brown, the trustee named in the within advertisement, do hereby certify that at the sale made on this day at the place and within the hours of day named in the annexed advertisement, Andrew J. Coons and Isaiah C. Brown became the purchasers of said land at and for the price of \$8.50 per acre, and have paid on their purchase \$500. [Signed] Wm. S. Brown, trustee.' The trustee, in a few days thereafter, paid over to the defendant the said sum of \$500 received from the plaintiffs. None of the parties at that time supposed that the tract contained less than eighty acres. Subsequently said tract was surveyed and found to contain only 23 15-100 acres, for which, at \$8.50 per acre, the price would be \$196.70. The excess paid by the plaintiffs and recovered by defendant was \$303.23. This excess was paid and received under a mutual mistake as to the quantity of land included in said tract. The defendant did not know the quantity of land contained in the tract. The sale was made of the tract at \$8.50. There was no representation or statement made at the time that said tract contained eighty acres, but it was put up as a tract containing eighty acres, more or less. Before the commencement of this suit, the plaintiffs demanded of the defendant the refunding to them of said excess of \$303.23, which the defendant refused. Thereupon the court declares that the plaintiffs are entitled to recover of the defendant the sum of \$303.23, with interest from the commencement of this suit, making the total sum of \$311."

A motion for a review was made and overruled.

Bay, for appellant.

I. The sale was of the entire tract. (Sugden, V. & P. 384; 3 Mass. 355; 6 Serg. & Raw. 488; 6 Binn. 102; 2 Johns. 37; 17 Mass. 207.) There was no privity of contract between North and the vendees; North never saw the land, was not present at the sale, and made no representation with regard to it. The pretence that the money was paid to North under a mutual mistake between him and the vendees is not warranted by the evidence. The money was paid to the trustee. It does not appear that North knew the vendees or the vendees him. The vendees did not pay the money to the trustee until five days after the sale. They had ample time to ascertain the quantity of the land. It is too late to invoke the aid of a court of chancery. This is a proceeding at law and the remedy, if any, is in chancery.

S. T. & A. D. Glover, for respondents.

I. The land was not sold in gross but by the acre. (Ayres v. Hays, 13 Mo. 259; Quisnell v. Woodlief, 2 Hen. & Munf. 173; Carter v. Campbell, 1 Gil. 139; Nelson v. Carrington, 4 Munf. 333; Bailey v. Snyder, 13 S. & R. 160.) The presumption is that both parties to a sale have regard to the quantity which both suppose the estate to contain. They especially adopt this rule where any other would work injustice, as where the discrepancy is very great between the estimated and actual contents of a tract. So where the contract rests *in fieri*. (Hill v. Buckley, 17 Ves. 394; 6 Binn. 102.) In this case all the parties supposed that the tract contained eighty acres. (1 Sugd. V. & P. 382, 319.) The effect of the words "more or less" is only to cover a small difference as to quantity one way or the other. (2 Hen. & Munf. 173; Thomas v. Perry, 1 Peters, C. C. 58. If plaintiffs purchased by the acre they were only liable to pay for as many acres as the tract contained, and the defendant had the right only to demand or receive as much as they were bound to pay. If they have paid more than they were bound

to pay, the defendant has received more than he ought to keep. He ought to refund it. The right of action in this case is on the familiar principle that money paid by mistake may be recovered back. (2 Sto. Eq. 501, § 1255; 2 Fonbl. Eq. book 2, ch. 1, note *b.*) The trustee was the agent of the grantor and the *cestui que trust*. The petition states all the facts out of which the equities arise as minutely as would be required in a bill in chancery. The suit may be called an action at law for money had and received, or a proceeding in equity.

NAPTON, Judge, delivered the opinion of the court.

We were not without doubt whether this action against the *cestui que trust* could be sustained, under any view of the law concerning the warranty and the mistake alledged. If this sale had been made directly by the owner who, upon receiving the purchase money, paid it over to his creditor, it is clear that the purchaser would have no action against such creditor. The money could not have been followed in his hands. There would be no privity between them, and the purchaser must look to his vendor to redress any losses he may have sustained through mistake or fraud. The same rule would apply if the sale had been by the sheriff under execution and the money paid over to the creditor. The rule of *caveat emptor* would apply, and if warranties or misrepresentations or innocent mistakes occurred, giving grounds for action to the injured purchaser, his redress would be limited to the person making the warranty or occasioning the mistake. The creditor, not having interfered in any way, would not be liable to refund. Here the sale was by a trustee holding the legal title to the land, through the agency of the owner, and for the benefit of the creditor and the owner. Considering him as an agent for the creditor, who is *cestui que trust* in the deed, as well as of the owner and debtor, we may in this way establish a privity between the parties. Considering that such a privity exists as would allow this action

in the event it could be maintained on other grounds, the question still remains whether this action for the surplus money received will lie.

We do not consider the sale made in this case as a sale by the acre. To give such a construction to sales of this nature, whether made by sheriffs or trustees or other agents, at public auction, merely because the bids are called for and received by the acre, would be contrary to what we apprehend is the general understanding of the country. Many of our surveys here, made by the officers of the United States government, are inaccurate, and sections of land are frequently found to overrun the quantity of 640 acres, and as frequently perhaps to fall short of this quantity. The subdivisions are, of course, equally inaccurate. Sales, especially public sales, are usually made by reference to these known surveys and subdivisions of surveys, and the purchase money is calculated by the number of acres; but the vendor is selling the tract, and the purchaser expects to get the tract without regard to mistakes which may have occurred in the original surveys, whether favorable to one side or the other. The conduct of the parties in this case is sufficient to show that, although the bidding was regulated by the price per acre, yet it was understood that the tract, as a tract, was sold, without reference to any deficiency or excess which an accurate survey might show. No provision was made for a resurvey, nor was any such contemplated. (Smith v. Evans, 6 Bin. 102.)

There was a mistake in this case common to all parties concerned in the sale, which certainly a court of equity would correct. The doctrine of the cases cited from the Virginia courts is reasonable in relation to the construction of the words "more or less" in describing the number of acres in a tract of land. It is intended to cover small deficiencies, such as the well known inaccuracies of government surveys produce; but it does not and ought not to compel a purchaser to take a tract of 500 acres which he has bought and paid for as containing a thousand acres. But the equity in

such cases does not arise from the fact of sale by the acre, and the consequent responsibility of the vendor to see that every acre contracted for is to be found in the survey, and his right to a price exactly proportioned to the number of acres, but it proceeds solely upon the ground of mistake and not of contract; and the question arises, how is the mistake to be corrected? Can a court of equity allow the purchaser to retain the land, and compel the vendor selling at public auction, and by an agent not perhaps of his own choosing and certainly not controlled in any way by his directions, to refund the surplus of the purchase money? We doubt whether this would be equity in any case. We see plainly that in many cases it would not. Here the tract was sold as a tract of eighty acres, and brought some five or six hundred dollars. It turns out to be only twenty-three acres. This fact was unknown to the *cestui que trust* in the deed, the defendant in this action, as well as to the trustee and the purchaser. We may assume that it was also unknown to all the bidders present. The tract was sold at about eight dollars per acre, and this made an aggregate, estimating it at eighty acres, sufficient to pay the debt for which it was sold. Whether the creditor would have suffered a sale at eight dollars per acre, if the quantity of acres had been known, is a matter we can not know. Whether other bidders would have let the tract go off at this price, with this knowledge, can not be known.

As the mistake was common both to purchaser and owner, we do not see any right which one has to insist on the contract being executed *pro tanto*. The purchaser would clearly have a right to rescind altogether; but this action is not brought upon this basis. The plaintiff proposes to retain the land at a price bid for a tract of eighty acres, when it has turned out to be less than one-third of that size. We see no equity in such a claim. To rescind the contract entirely could injure neither party, but places them both where they stood, with a discovery of the mistake. The land can be put up again, and if it is worth no more than eight dollars per acre as a tract of twenty-three acres he is not injured, and the

Anderson v. Baumgartner.

defendant and others will have an opportunity of bidding with a knowledge of the fact now disclosed, which they did not have at the former sale, and which we would utterly deprive them of if this action in its present form be sustained.

The plaintiff may if he sees fit amend, and with this view the judgment is reversed and the cause remanded. Judge Scott concurring; Judge Richardson not sitting.

ANDERSON, Respondent, v. BAUMGARTNER *et al.*, Appellants.

1. The transfer of a debt secured by mortgage or deed of trust carries the security with it as an incident; if several promissory notes, secured by the same instrument, be assigned to different persons, the assignee of each note will, as a general rule, acquire an equitable interest in the mortgage.
2. The interest which the assignee thus acquires in the security is purely equitable; it may be lost through his negligence; it will be so lost where the rights of innocent purchasers intervene who have been misled by improper representations on his part or lulled into security by his silence when it was his duty to speak.

Appeal from St. Louis Land Court.

The object of this suit was to compel the trustees under a deed of trust to advertise and sell the premises described therein, and to apply the proceeds in payment of certain promissory notes alleged to be secured by said deed. Baumgartner and Robbins, the trustees, and Andrew Christy, the assignee of other notes secured by the same deed of trust, and George B. Michael, the purchaser at a sale under a junior deed of trust, were made parties defendant to the suit. The petition states in substance that on the 19th day of May, 1846, one John S. Watson made forty promissory notes, payable to George M. Moore; that nineteen of these notes were for the sum of eighty dollars each, and were made payable consecutively at intervals of three months from their common date, May 19, 1846; that twenty of these notes were for \$100 each, payable consecutively every

Anderson v. Baumgartner.

three months after five years from their common date; that one of said notes was for \$4,000, payable in ten years from date; that the plaintiff, Anderson, is the *bona fide* assignee and holder under Moore of seven of said notes, to-wit: those payable in 51, 54, 57, 60, 63, 66 and 69 months from date; that all those falling due prior to said seven notes held by plaintiff were paid and satisfied; that all the other notes had been assigned to Andrew Christy; that to secure said notes Watson gave a deed of trust on certain real estate, in which deed Baumgartner and Robbins were named as trustees; that Michael subsequently became the purchaser of the estate of Watson in the land embraced by said deed of trust, and holds subject to said deed; that at the time of his purchase he had both actual and constructive notice that the seven notes held by the plaintiff were a charge on the land and were unpaid. The plaintiff prayed the court for an order "requiring and directing said Baumgartner and Robbins to advertise and sell the premises described in said deed of trust, in the manner in said deed provided, and to apply the proceeds of such sale, according to the provisions of said deed, first, to the payment of the costs and expenses of said trust; next, to the payment of plaintiff's demand, and the balance," &c.

The defendants, Michael, Christy, and Baumgartner, answered alleging that after the making of said deed of trust by Watson to Moore, Watson made, on the 3d day of June, 1851, another deed of trust of the same premises to the plaintiff as trustee to secure a note of \$7,000 to one Barclay, payable in one year after date; that, shortly after, plaintiff, Anderson, purchased and became the owner of this last mentioned note and deed of trust; that the seven notes mentioned in the petition became due and unpaid and a sale under the deed of trust to Moore was advertised; that, before the day of sale, said notes were paid by Watson or the plaintiff and were given up to be cancelled; that immediately thereafter Moore transferred the remaining notes to Christy and assigned to him the deed of trust; that afterwards the plaintiff made

a sale of the premises to satisfy the second deed of trust to Barclay; and applied to Michael to become the purchaser, representing that there was nothing unpaid on the first deed of trust except the notes transferred to Christy; that Michael applied to Moore and Christy for information, and was told by them that nothing was due on the first deed of trust except the notes in the hands of Christy; that on the faith of these representations Michael became the purchaser under the second deed of trust at the sum of \$7,500; that he had no notice that said seven notes were subsisting encumbrances on the land; that Christy had no notice at the time of his purchase that said seven notes were still unsatisfied; that Baumgartner refused to sell the land for the satisfaction of said notes, because he was informed by Moore, while he was a holder of the first deed of trust, that the notes had been paid.

The cause was tried by the court without a jury. In its finding the court sets forth the execution of the notes and the deed of trust by Watson as stated in the petition, and then proceeds as follows: "That on the 21st day of June, 1851, said Watson executed a second deed of trust on the same property to the plaintiff as trustee to secure the payment of a second note for \$7,000, payable to one Barclay; that said property was sold by said Anderson, as such trustee, under said second deed of trust, on the 6th day of September, 1852, and purchased by one Carpenter, who transferred his bid to the defendant Michael, to whom the plaintiff, as such trustee, made a deed on the 13th of September, 1852; that Michael thereby acquired all title remaining in said Watson in said property subject to senior encumbrances; that on the 16th day of March, 1851, all of said notes secured by said first deed of trust remaining unpaid and also said deed of trust were in the hands of Henry B. Belt, to whom they had previously been delivered by said Moore as collateral security for moneys advanced by Belt to Moore; that said notes, when left by Moore with Belt, were endorsed by said Moore in blank without recourse; that said property being then ad-

Anderson v. Baumgartner.

vertised for sale under said first deed of trust for the satisfaction of the notes then due, the plaintiff, at the time being the holder of the Barclay note secured by said second deed of trust, for the purpose of stopping said sale, and protecting his interest as junior encumbrancer, became the purchaser for value of seven of said notes then due, namely: three for the sum of eighty dollars each, payable respectively in 51, 54 and 57 months after date, and four for the sum of one hundred dollars each, payable respectively in five years, 63, 66 and 69 months after date, which were then delivered by said Belt to said plaintiff thus endorsed, and said sale was stopped; that said seven notes were the only notes then due and unpaid; that on the 16th of March, 1851, all the remaining unmatured and unpaid notes described in said deed of trust and the deed itself were passed over to defendant, Christy—the notes being assigned by Moore without recourse, who also transferred, in writing without seal, his interest in the deed of trust to said Christy; that said seven notes thus purchased by plaintiff have never been paid; and that he acquired them in good faith, and is the holder and owner of the same; that afterwards he requested the said trustees to sell said property for the satisfaction of the notes held by him; that Robbins was willing to execute the trust, but Baumgartner refused on the supposition that said notes had been paid, and were no longer a lien on said property.

“Thereupon the court declares the law as follows: That plaintiff is entitled to have satisfaction of his said seven notes and interest, by a sale of the property described in said deed of trust from Watson and wife to said Baumgartner and Robbins; said sale to be made according to the terms and conditions in said deed mentioned and herein recited. And the court doth order and adjudge that said defendants, Baumgartner and Robbins, do proceed within fifty days of the date hereof to advertise said property for sale, in the manner and upon the terms specified in said deed, and that they proceed to sell the same as therein authorized, and that out of the proceeds of said sale they pay, first, the costs and expenses

Anderson v. Baumgartner.

of executing said trust, including the costs of this suit; secondly, whatever sum or sums of principal and interest may then appear to be due to said plaintiff upon said seven notes; and dispose of the remainder, if any, of money in their hands, as by said deed directed, and that they report their proceedings herein to this court, without delay, after making such sale."

The defendants made a motion in review, which was overruled.

Field, for appellants.

I. The testimony fairly shows that the seven notes taken up by Anderson were paid under some arrangement with Watson the debtor. But supposing that Anderson held the seven notes as assignee under Moore, he did not, in the absence of any special agreement, by the mere fact of his being owner of a part of the mortgage debt, become proprietor of the mortgage security. A mortgage is an entire thing. It must be redeemed or foreclosed for the whole and not by parcels. Anderson simply relied on the personal credit of the debtor. (See *Mandeville v. Welch*, 5 Wheat. 277; *Langdon v. Keith*, 9 Verm. 299.) Whatever may be the equity of Anderson in reference to Watson or Moore, he has no equity against Michael, who is a purchaser under Anderson himself without any notice of his pretended equity. No notice was given to Michael of the secret equity now set up by Anderson. It is no answer to say that the bidders at Anderson's trust sale were advertised of interest notes being due on the Moore mortgage. At the least, this advertisement as testified to was deceptive and misleading. It is apparent that both parties understood at the time that Michael acquired the property subject only to the Moore notes in the hands of Christy. (See *Brown v. Wheeler*, 1 Root, 236; *Morse v. Child*, 6 N. H. 521; 1 John. Ch. 354.) The conduct of Anderson is marked with excessive negligence and imprudence. He took up the seven interest notes under circumstances fairly showing that he intended to pay and extinguish them,

Anderson v. Baumgartner.

He asked for no assignment of any part of the mortgage to Moore. He gave no notice to Moore or his assignee and agent Belt that he claimed any interest in the mortgage. He subsequently conveys the property to Michael without any notice of his dormant equity. (*Hughes v. McAllister*, 15 Mo. 302.) The course of Michael was marked with that degree of caution which characterizes the conduct of prudent men in the transaction of business. He was distinctly informed by Moore that the seven notes now in controversy had been paid and satisfied. On the faith of this statement Michael became the purchaser under Anderson. Christy was assignee under Moore. The petition does not charge him with notice of Anderson's pretended equity, and no such notice is found in the decision of the court. His equity is superior to that of Anderson.

Hill, Glover & Hill, for respondent.

I. The court was warranted by the evidence in its finding of facts. Anderson was a purchaser of the notes in good faith. He took them by assignment as a purchaser to protect his junior encumbrance. Moore's understanding of the transaction subsequent to the transfer of the notes to Anderson, could not affect Anderson's rights as a *bona fide* assignee. Michael was not the purchaser at the sale under the second deed, nor was he present at the sale. Carpenter became the purchaser with actual notice given by Anderson at the sale of the fact that there were notes for back interest unpaid under the first deed of trust amounting to about \$800. When Anderson purchased the seven notes, they were all that were due. The seven notes amounted to \$640 exclusive of interest—about \$84 more. The recollection of Carpenter is vague and uncertain as to where these interest notes were said to be. At one time he says he thinks they were said to be in Christy's hands, and that Anderson referred to Christy, but says he was not certain and that his recollection was indistinct. But two notes could have matured between maturity of the last of the seven notes held by An-

Anderson v. Baumgartner.

derson and the date of the sale in September, 1852, and these would amount to but little more than \$200 including interest to that time. It is not attempted to be shown or even pretended that Christy then held any interest notes which were due. The reasonable inference then is that Anderson referred to the back interest notes held by himself, and also spoke in the same connection of the deed of trust and remaining notes held by Christy, all which in the lapse of time had become confused in the mind of Carpenter. He is quite certain that notice was given by Anderson that interest notes were due, and thinks the amount was stated at about \$800, which was in fact seventy-six dollars above the true amount, but as near as Anderson might be able to state without having the papers before him. It is only by supposing that Anderson was here speaking of the notes held by himself and as being held by him that the remaining facts in the case can be reconciled. There is not a particle of evidence that Anderson ever made any representations to either of the defendants inconsistent with the rights he claims in this suit—none that he was ever applied to for information; nor was he bound to give notice of his superior claim when selling under a junior trust. The finding should not be disturbed even though this court might find the facts differently.

II. The conclusion and judgment of the court upon the facts as found were warranted by law. The assignment of a note secured by mortgage is, in equity, an assignment of the mortgage, unless there be some special provision by the parties to the contrary. (3 Johns. Ch. 322; 1 Root, 248; 6 S. & M. 139; 4 Blackf. 539; 1 Johns. 580; 1 Penn. 280; 2 Ala. 190; Walker's Ch. 221; 10 S. & M. 631; 21 Verm. 331; 8 Blackf. 447.) The notes first maturing have a preference.

RICHARDSON, Judge, delivered the opinion of the court.

The doctrine is well settled that the transfer of a debt carries with it in equity the mortgage security; and if several

Anderson v. Baumgartner.

notes secured in the same mortgage are assigned to different persons, as a general rule the holder of each note will acquire by the assignment an equitable interest in the mortgage. (*Keyes v. Wood*, 21 Verm. 331; 1 *Hilliard on Mortg.* chap. 11; *Thayer v. Campbell*, 9 Mo. 277.) The security is only an incident to the debt; and, if the principal be assigned and there be no agreement to the contrary, the mortgage will pass with it. The interest however which the assignee acquires in the mortgage is purely equitable, and will be controlled by the considerations that operate on courts of equity in adjusting conflicting equities between different parties. It will give way to a superior equity and may be lost by the negligence of the party asserting it. The assignment of the debt will be effectual to transfer the security as between the assignee and the parties to the mortgage, but it may be inoperative for that purpose when the rights of innocent purchasers intervene, who have been misled by the improper representations of the assignee, or lulled into security by his silence when it was his duty to speak.

It appears that when Christy purchased the notes which he holds, he was told by Moore that all the other notes had been paid; and when Michael applied to Moore, who then held the Christy notes, for information on the subject, with the view of purchasing under the junior deed, he was likewise told that all the notes had been paid except those now in Christy's hands. If Christy and Michael did not know that the plaintiff held any of the notes, to whom else could they apply for information except to Moore? How were they to know of the plaintiff's dormant equity? Michael, then, having been informed by Moore that the notes which the plaintiff has had been paid, had every reason to act on the information, and no ordinary diligence could have apprised him of the plaintiff's claim. When Anderson came to sell under the second encumbrance, in which he had united in himself the double interest of trustee and beneficiary, the evidence shows that there was inquiry as to the amount due under the first deed. Common justice to the bidders required him to

give such information as he had, and, claiming an interest in the first deed, which was not a matter of record or necessarily known to any person present, it was his duty to make it known. Dr. Carpenter, a witness introduced by the plaintiff, testified that he bought the property at the sale; that Mr. Anderson made a statement at the sale in relation to the deed of trust to Moore and the interest notes, but did not speak of having any of the notes in his possession. He further stated, on cross-examination, that the unpaid interest notes were said to be in Christy's hands, and that plaintiff referred him to Christy for the amount due; and though in his re-examination by the plaintiff he broke somewhat the force of this statement by the qualification that upon reflection he was not certain "whether Anderson said where the notes were," it does not seem that Mr. Anderson advised any person at the sale of the existence of the seven notes, or that he had any interest in the first encumbrance. It is true that Michael was not at the sale, but Dr. Carpenter states that Anderson requested him to surrender his bid to Michael, and that, in consideration of five hundred dollars paid to him by Anderson, and the agreement of Michael to indemnify him against a security debt of one thousand dollars, he substituted Michael in his place. The plaintiff now asserts that he had in his possession, at the time of the sale under the second deed, seven of the notes secured by the first, and seeks to have the property purchased at his own sale subjected to the payment of these notes. The evidence shows that Michael had every reason to believe that the seven notes had been paid; and the question now is, shall the plaintiff lose his lien, or shall Michael's property, purchased without notice of the lien, be subjected to it? If the plaintiff had used proper diligence at or before the sale in making known his silent claim, the purchaser would have bought with his eyes open and the property would have remained charged with the lien; but his negligence misled others, and his equity must yield to the better right of the innocent purchaser. It is said that the first encumbrance was duly recorded, and that all persons

Aubuchon v. Ames.

were bound to take notice of it. This is true; but of what was the registry notice? The defendants were presumed to know that there was a prior encumbrance; but, as the mortgagee himself said that the seven notes in question were paid, and the plaintiff at his sale, under the second deed, did not disclose his interest, though the notes were in his possession, the defendants reasonably inferred that they had been paid as they matured. The plaintiff conducted the sale; the amount due on the first encumbrance was the subject of conversation; and he could not have forgotten his own debt, if he intended to assert it against the property; and a word from him in season would have avoided this whole controversy.

All the judges concurring, the judgment will be reversed.

AUBUCHON *et al.*, Plaintiffs in Error, v. AMES, Defendant in Error.

1. Where a field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitation will run in favor of an adverse possession prior to a survey by the United States, although in the tabular list of the recorder the claim was stated to be "confirmed to be surveyed."

Error to St. Louis Court of Common Pleas.

This was an action of ejectment to recover an undivided three-tenths of so much of a tract of three by forty arpens in the "Grand Prairie common field" of St. Louis as the defendant should be shown to be in possession of. Plaintiffs claim title as the legal representatives of widow Hebert, to whose representatives the said lot was confirmed by act of Congress of April 29, 1816. The facts of this case, as they appeared in evidence, are the same as those of the case of *Aubuchon v. Murphy*. (See 22 Mo. 115.) In this case evidence was introduced by defendant showing the identity of Charles Sanguinet, who made the memorandum of sale of the property to Brazeau.

The court, at the instance of the defendant, gave the following instructions and the plaintiff duly excepted thereto: "1. If the jury believe from the evidence that the widow Hebert, from whom the plaintiff claims title, was the same person of whose estate Charles Sanguinet was appointed administrator, as given in evidence, and that the writing given in evidence of Charles Sanguinet to Joseph Brazeau was made by said Sanguinet as said administrator, and that it embraced any of the land sued for in this suit, and that the deeds given in evidence respectively, of said Brazeau and wife to Louis and Auguste Brazeau, and of said Louis and Auguste to Angus L. Langham, and of said Langham by the sheriff of the county of St. Louis to Brown Cozzens, and of said Cozzens to Edward Bates, and of said Bates to the defendant Ames, embraced any of the land sued for in this suit, and that said Langham as early as 1819 entered upon and took possession thereof, under said deed of Louis and Auguste, and made costly and notorious improvements on the same, and dwelt there, and that the possession and improvement of the same have ever since been kept and continued publicly, expensively and conspicuously by said Langham, Cozzens and Ames, and others under or through them respectively, successively, under a claim of right thereto by virtue of said writing and deeds, and that Louis and Henry Trudeau and Mrs. Ranger, grantors of the plaintiff, have been of the age of twenty-one years, and Mrs. Ranger unmarried, also for twenty years next before the commencement of this suit, then the jury may presume that said Sanguinet did lawfully sell said land to said Joseph Brazeau, and find for the defendant as to said land. 2. If the jury believe from the evidence that the widow Hebert, from whom the plaintiff claims title, was the same person who is a party to the instrument of conveyance of widow Hebert to Joseph Labuxiere, given in evidence, and that said instrument embraces any of the land sued for in this suit, then they should find for the defendant as to so much of the land sued for in this suit as is embraced in said instrument. 3. If the jury believe from

the evidence that the defendant and those through whom he claims and holds possession of so much of the land sued for as he was in possession of when this suit was begun, had had the continuous possession thereof for and during twenty years next before the commencement of this suit, claiming the same adversely to all others, and that twenty years before this suit was begun Henry and Louis Trudeau, and Mrs. Ranger, the grantors of the plaintiff, were twenty-one years of age, and Mrs. Ranger unmarried also, and that their parents were also dead as long before this suit was begun, then they should find for the defendant. 4. And if the jury believe from the evidence that the defendant and those through whom he claims the land in controversy entered upon the same under deeds embracing the same, the jury should find that the possession so taken of any part embraced in such deeds was a possession of the whole, unless the contrary be proved, and every possession thereof by others, by their respective permissions or authority, was their possession respectively."

The plaintiff asked the following instructions, which the court refused, and the plaintiff duly excepted: "5. The paper purporting to be a deed from Charles Sanguinet to Joseph Brazeau, dated the 26th December, 1786, a copy of the record of which has been given in evidence by the defendant, and the paper purporting to be archive No. 2389, a copy of the record of which has been given in evidence by the defendant, do not, nor does either of them pass to said Brazeau any title or claim to the premises therein described that had belonged to the widow Hebert in her lifetime. 6. The statute of limitations would not begin to run against the legal representatives of the widow Hebert as to the land mentioned in the confirmation papers given in evidence by the plaintiff, before the execution of the United States survey No. 1256, given in evidence by the plaintiff."

The plaintiff took a nonsuit with leave, &c.

Polk, for plaintiff in error.

I. The instrument purporting to be a memorandum of sale

Aubuchon v. Ames.

by Charles Sanguinet ought to have been excluded from the jury.

II. The statute of limitations did not begin to run in this case until the 29th of April, 1851, the date of the approval of the survey by the United States of the confirmation given in evidence. (*West v. Cochran*, 17 How. 416.)

III. The first instruction is erroneous. (See 1 Phil. Ev. 161; *Cow. & Hill's notes*, 357; 2 Conn. 631; *Dessaunier v. Murphy*, 22 Mo. 95.)

Krum & Harding, for defendant in error.

I. The memorandum of sale was properly admitted. (*Aubuchon v. Murphy*, 22 Mo. 115.)

II. A survey was not necessary in this case. The statute of limitations ran prior to the survey.

III. The court committed no error in giving or refusing instructions.

RICHARDSON, Judge delivered the opinion of the court.

This suit is brought to recover an undivided interest in a common field lot situate in the Grand Prairie of St. Louis, conceded to the widow Hebert and confirmed to her representatives by the second section of the act of Congress approved April 29, 1816, entitled "An act for the confirmation of certain claims to land in the western district of the state of Louisiana and in the territory of Missouri." Under the proper head in the tabular list of decisions by the recorder reported to Congress and opposite the claim of widow Hebert is this remark: "Confirmed 120 arpens to be surveyed." The survey was executed in 1838, but not approved until the 29th of April, 1851, just thirty-five years after the confirmation, and we are not apprised that a patent has yet been issued.

The controlling question in the case is, when the statute of limitations began to run against the plaintiff in favor of the adverse possession?

The act of 1807 respecting claims to land in the territory

Aubuchon v. Ames.

of New Orleans and the district of Louisiana contained no words of present grant, but was prospective in its operation; and the rights of claimants were dependent on acts to be performed by them and the subsequent decisions of the commissioners. The fee that resided in the United States was not then passed to the claimants, and the act only undertook to provide measures for ascertaining and adjusting claims without confirming them, "but gave to the board of commissioners power to adjudicate claims against the United States and conclude the government as to the question of right in the claimant." Whether any claim would ever be confirmed was not known when the act was approved, for confirmations depended on the proofs of the parties and the decisions of the board; and if commissioners had not been appointed, or had failed to act, or had decided adversely to the claimants, the law would not have benefitted any person.

But the act of 29th April, 1816, spoke in a different tone and tense, and declared that the claims embraced in the recorder's reports, which had received his favorable decision, "*shall be and the same are hereby confirmed.*" A confirmation by this act carried the legal title, and being a direct grant of the fee by Congress was the highest evidence and grade of title. (*Strother v. Lucas*, 12 Peters, 454; *Marsh v. Brooks*, 14 How. 524.) No one in this state has ever doubted that land confirmed by this act was subject to taxation, that it was vendible under execution, and passed by will or deed, or under the statute of descents; and it has never been supposed that these incidents of ownership were suspended until it was the pleasure of the deputy surveyor to make the survey, or the clerks in the land department at Washington to prepare the patents.

In *Grignon v. Astor*, 2 How. 369, the claim of Pierre Grignon was confirmed by an act of Congress passed in February, 1823, for which the patent did not issue until 1829, and in the meantime the land having been sold by his administrator under an order of court, it was contended that the sale was void, because he had no such estate, until the ema-

nation of the patent, as could be sold ; but the court observed that " the title became a legal one by its confirmation by the act of Congress of February, 1823, which was equivalent to a patent," and that " it was a higher evidence of title, as it was the direct grant of the fee, which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers."

The confirmation in the case of West and Cochran, 17 How. 403, was under the act of 1807, which, we think, is essentially different from the act of 1816 ; and it may be doubted whether the doctrine of that case was intended to apply to any claims except such as are so uncertain as to their boundaries that public surveys are necessary to locate them ; for the learned judge who delivered the opinion in that case, after saying in the later case of Stanford and Taylor, 18 How. 412, that "*where the claim has no certain limits*, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the land of others," attaches to no land until it is designated by a survey, proceeds then to show that the concession to Angela Chauvin was so indefinite in its boundary that a survey was required to attach it to any land.

It is not pretended in this case that the concession to the widow Hebert was uncertain as to its location, or that it required a survey to identify it. It was one of the common field lots in the Grand Prairie, bounded on the north by the lot of Bizette, and on the south by Kiercereau, and its definite location was no doubt quite as well known forty years ago, when Langham built on the tract, as it has been since the approval of the survey in 1851. Since 1818, buildings at different times have been erected on this land ; it has been occupied and owned by various persons ; it has been the subject of repeated sales and conveyances, and all the time since the confirmation has been treated as private property.

Our laws from 1825 down to the present time have authorized actions of ejectment to be maintained on confirma-

Adams v. Wiggins Ferry Co.

tions under the act of 1816, and there is no reason in justice and no principle of public policy why the statute of limitations should be so suspended until a survey is made or the patent issues in favor of a title like the one in this case on which an action of ejectment could have been maintained more than thirty years ago. If a party is under disability or can not sue or recover on his title because something remains to be done by the government to give him a right of action, time should not be counted against him in favor of an adverse possession. But when a full right of action in all the forms of law is given, the repose of the country requires that the same measure of indiscriminate justice should be applied to actions on titles of this character that governs other actions of ejectment.

The view we have taken of the case renders it necessary to extend this opinion further or to notice the instructions in detail; and, in relation to the first instruction given for the defendant it is sufficient to say that, whether the hypothetical facts stated in it warranted the jury in presuming that Sanguinet lawfully sold the land to Brazeau is immaterial and need not be discussed or decided, for the instruction contained another distinct element independent of the doctrine of presumption, and the verdict could not have been made on this instruction unless the jury had found the existence of facts absolutely necessary to establish a perfect defence under the statute of limitations.

All the judges concurring, the judgment will be affirmed.

ADAMS *et al.*, Respondents, v. WIGGINS FERRY CO., Appellants.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of.

Adams v. Wiggins Ferry Co.

2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence.

Appeal from St. Louis Court of Common Pleas.

This was an action to recover damages for the loss, through the negligence of defendant, of a barge belonging to the plaintiff. The barge was lying at the wharf in the city of St. Louis, and was struck by a ferry-boat belonging to defendant. The defendant denied the negligence alleged, and alleged that the barge was lying at a point at the wharf that was appropriated by the city ordinance to the ferry-boats belonging to defendant; that the injury of which plaintiffs complained resulted from the wrong of plaintiffs in thus mooring their barge.

The following instruction was given to the jury at the instance of plaintiff: "1. If the jury shall believe that the barge or wood-boat in question was moored in a place not permitted by the city authorities at the time of the collision referred to in the petition, and that notwithstanding this the ferry-boat of defendant could have reached the landing by the exercise of ordinary care and skill on the part of those who had charge of said ferry-boat, without inflicting the injury complained of, then the fact of her being so out of place constitutes of itself no defence to this action."

The court, of its own motion, gave the following instructions: "2. If the jury believe from the evidence that the plaintiffs were co-partners at the time of the injury complained of, and that the barge and wood in question were their property, and that the injury to said property was caused by the negligence or unskillfulness of the officers or crew of the ferry-boat belonging to the defendant, without any fault on the part of the owners, officers or crew of the barge contributing substantially thereto, the jury should find for the plaintiffs and assess the damages sustained thereby. 3. If

the injury was caused by the negligence or unskillfulness of the plaintiffs, or of the officers or crew of said barge, or if such negligence or unskillfulness contributed substantially to produce said injury, or if the injury was not caused by negligence or unskillfulness on the part of the officers or crew of the ferry-boat or agents of the defendant, then the jury should find for the defendant. 4. If both parties were in fault and the fault of each contributed substantially to produce said injury, or if neither was in fault, the jury should find for the defendant. 5. If the barge was moored and left by her owners in a hazardous position, and the officers and crew of the ferry-boat used ordinary care and skill to avoid injuring the barge, and the injury complained of occurred notwithstanding said care, diligence and skill on the part of said ferry-boat, the jury should find for the defendant. 6. If the barge was in a dangerous position at the time, and the injury complained of would not have occurred if ordinary care, diligence and skill had been used on the part of the ferry-boat, then the jury should find for the plaintiffs, unless the plaintiffs, by their negligence or unskillfulness at the time, contributed substantially to said injury."

The court gave the following instruction at the instance of defendant: "7. If the jury believe from the evidence that the injury done to the barge was occasioned by the negligence of both plaintiffs and the defendant, and their mutual negligence caused or produced the injury, the plaintiffs can not recover, and the jury will find for the defendant."

Numerous instructions asked by defendant were refused. The jury found for plaintiffs.

B. A. Hill, for appellant.

I. The court erred in giving and refusing instructions. If the plaintiffs' barge was moored in an improper place according to the ordinances of the port, the plaintiffs can not recover unless the defendant wilfully ran into her without any necessity for so doing and sunk her. Defendant was not required to use any other than ordinary precautions. The

Adams v. Wiggins Ferry Co.

plaintiffs were in fault in mooring the barge at the ferry landing. Being in fault, they can not recover unless defendant wilfully ran into the barge without occasion. Plaintiffs' fault tended to produce the injury. A vessel injured by negligent mooring can not recover for the damages received. (1 How. 89; Angell on Carr. § 643-6, 633, 638; 29 Eng. Law & Equity, 49.)

Gray, for respondents.

I. The instructions given were legal and proper, and covered the whole law of the case fully and fairly. (Angell on Carr. § 638-9; Sedg. on Dam. 469, 470; 11 East. 60; 9 Carr. & Pag. 601, 613; 3 M. & W. 244; 1 Scott, 392; 16 Conn. 420; 19 Conn. 566; 1 Denio, 91; 3 Ohio, State, 172.) When both parties are in fault, the plaintiff remotely and the defendant proximately, the plaintiff may be entitled to recover. (10 M. & W. 545; 24 Verm. 488; 3 Ohio, State, 172; 4 Id. 474.)

SCOTT, Judge, delivered the opinion of the court.

The rule that there can be no recovery when both plaintiff and defendant are in fault, and each, by his negligence or otherwise, has contributed proximately and directly to the injury, has its most frequent application in cases of collisions of vessels, carriages and like vehicles, when they are in motion and on the public thoroughfares. But in such collisions, if one party finds the other in fault, he can not wantonly or intentionally inflict an injury upon him. The principle above stated does not apply to cases in which the fault or neglect of the plaintiff has contributed remotely to the injury. Because one has committed a fault or been guilty of a negligence, he does not thereby place himself at the mercy of every one who may encounter or come in the way of the object in relation to which the fault or negligence has been committed or imputed. If a person discovers that a fault has been committed by another, he is not thereby released from the obligation of conducting himself with ordinary care

Adams v. Wiggins Ferry Co.

and prudence in relation to him in order to avoid doing an injury.

In the case of *Butterfield v. Forrester*, 11 East, 60, the defendant, for the purpose of making some repairs to his house which was close to the road-side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. The plaintiff at an hour in the evening when there was light enough to discover the obstruction at the distance of one hundred yards was riding very violently, and, not observing the obstruction, his horse ran against it and fell with his rider, who was much hurt in consequence of the accident. In answer to the plaintiff's action, Lord Ellenborough said, a party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use ordinary and common caution to be in the right. In cases of persons riding upon what is considered the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. In the case of *Davis v. Mann*, 10 Mees. & Wels. 545, the plaintiff, having fettered the fore feet of an ass, turned it into a public highway, and as the ass was grazing on the side of the road about eight yards wide, the defendant's wagon with three horses, the driver being behind, coming down a descent at a smart pace, ran against the ass, knocked it down, and the wheels running over it it soon after died. The plaintiff recovered. The court said, that, although the ass was wrongfully on the road, that the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road. In

Adams v. Wiggins Ferry Co.

the case of *Kerwhacker v. The Cleveland, Columbus and Cincinnati R. R. Co.*, 3 Ohio, State, 189, it is said, that the mere fact, however, that one person is in the wrong, does not of itself discharge another from the observance of a due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. There have been numerous adjudications, both in England and in this country, where parties have been held responsible for their negligence, although the party injured was, at the time of the occurrence, culpable, and, in some of the cases, in the actual commission of a trespass. In the case of *Trow v. The Vermont Central Railroad Co.*, 24 Verm. 488, it was held that when the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet, if at the time the injury is committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. The case of *The New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 428, was one for an injury to a steamboat. The defendant claimed and offered evidence that at the time of the injury the lights of the boat were not up according to the statute law of the state, and prayed the court to instruct if this was so the plaintiff could not recover. The court said that, while on the one hand a party shall not recover damages for an injury which has been brought on himself, neither shall he be allowed to protect himself from an injury which he has committed because the party injured was in the wrong, unless such wrong contributed to produce the injury, and even then it would seem a party is bound to use common and ordinary caution to be in the right. Sedgwick, in his work on the law of Damages, p. 470, approves the principle of the case of *Davis v. Mann*, 10 Mees. & Wels., to which reference has been made. So does Angell, in his treatise on the law of Carriers, p. 532; as also Judge Redfield, in his book on Railways.

Bersch v. Schneider.

We have stated the facts of most of the cases to which we have referred because it seemed necessary to do so in order fully to understand their bearing upon the matter before us. We conceive the law as deduced from them to be, that, although where both parties are in fault, where there is negligence on both sides, and both *actively* contribute to the injury at the time of its commission, there can be no recovery, yet, where there is a mere passive fault or negligence on the part of the plaintiff, the defendant is bound to the observance of ordinary care and prudence in order to avoid doing him a wrong. In the case before us, the boat received the injury complained of when she was moored, and although she was in a prohibited place—one from which she had been lawfully ordered to be removed—the defendant was not released from the obligation imposed both by law and sound morality of using ordinary care and diligence in order to avoid injuring her. If by the fault of the plaintiffs, in leaving their boat at the place where she was found, the defendant could not avoid injuring her, by the observance of ordinary care and prudence, they would be without redress.

We are of the opinion that the instructions given put the law of the case correctly to the jury, and, although some of the refused instructions may have contained correct legal propositions, yet, as the instructions given embodied the law of the case, the defendant was not prejudiced by their refusal. Judge Napton concurring, judgment affirmed; Judge Richardson dissenting.

BERSCH, Respondent, v. SCHNEIDER, Appellant.

1. A judgment rendered by a justice of the peace is void unless it appears on the face of the proceedings that the justice acquired jurisdiction of the cause by service of process on the defendant or by his appearance.

Appeal from St. Louis Law Commissioner's Court.

This was an action (originally commenced before a justice of the peace) on a due bill or non-negotiable promissory note

Bersch v. Schneider.

for one hundred dollars executed by defendant Schneider in favor of one George Woldsmith and assigned by said Woldsmith to the plaintiff, Bersch. At the trial the plaintiff introduced in evidence the note and proved the assignment to himself. The defendant then introduced in evidence certain entries from the docket of Samuel Treadway, a justice of the peace in St. Louis county, in a case wherein Caspar Stalle, Henry Schneipel and Jerome Downey were plaintiffs, and George Woldsmith and Jacob Hoch defendants. From these entries it appeared that a judgment was rendered for plaintiffs against the defendants Woldsmith and Hoch for \$89.80. It did not appear that the defendants or either of them had been served with process, or had appeared to the suit. It also appeared that two several executions had issued against defendants, and that under the last execution Schneider was garnished as a debtor of Woldsmith, and that judgment was rendered against him as garnishee for the amount of the note in controversy in the present suit.

At the instance of the plaintiff the court gave the following instructions: "1. A judgment entered up against Schneider by Justice McDonald in favor of Caspar Stalle upon said Schneider's being summoned as shown in the return of the execution issued by Justice Treadway, is no bar to the plaintiff's recovery in this suit. There is no judgment upon which the executions read in evidence could issue. 2. There is no judgment in favor of Caspar Stalle, Henry Schneipel and Jerome Downey, plaintiffs in the execution upon which Schneider was garnished, against said Schneider. 3. There is no judgment in favor of Caspar Stalle, Henry Schneipel and Jerome Downey against George Woldsmith and Jacob Hoch upon which the executions read in evidence could issue. 4. The plaintiff is entitled to recover the full amount of the note sued on with interest."

The court found for plaintiff.

C. C. Simmons, for appellant.

Bay, for respondent.

State, to use of Bredell's Exec'r v. Baldwin.

RICHARDSON, Judge, delivered the opinion of the court.

The defence set up to defeat a recovery on the note is that a judgment had been recovered against the defendant in a garnishment proceeding under an execution issued on a judgment rendered by Justice Treadway in favor of Caspar Stalle and others, against George Woldsmith, the payee and assignor of the note. The merits of the defence must depend on the validity of the original judgment, for the proceedings that followed after the defendant was garnished can not be upheld unless there was a valid judgment to support them and to authorize the execution. The transcript of Justice Treadway does not show that the defendant appeared, or that process was ever issued or served; and consequently he did not obtain jurisdiction over the defendant, and the proceeding was *coram non judice*. Jurisdiction will be presumed as to courts of general authority, but as to inferior courts the rule is different, and those who claim rights or exemptions under their proceedings must show their jurisdiction. (State v. Metzger, 26 Mo. 65.)

The defendant necessarily relied on the first judgment to sustain the subsequent proceedings under it, and as it was rendered, so far as the transcript shows, without process or appearance, it is void. (Biglow v. Stearn, 19 John. 39.) The judgment will be affirmed; the other judges concurring.

THE STATE, TO USE OF BREDELL'S EXECUTOR, Plaintiff in Error,
v. BALDWIN *et al.*, Defendants in Error.

1. A surviving partner retained possession of the partnership effects and gave bond under sections 50 and 51 of the first article of the administration act of 1845 (R. C. 1845, p. 70); a settlement was made by him in the probate court and an order was made by said court apportioning to the estate of the deceased partner one-half of the balance found to be in the hands of such surviving partner. *Held*, in an action on the bond to recover a debt due to the deceased partner for money advanced by him to the firm, that this settlement was not conclusive as against his estate as to the amount due thereto from the surviving partner, or as to the amount of assets in the hands of the latter.

State, to use of Bredell's Exec'r, v. Baldwin.

Error to St. Louis Court of Common Pleas.

Smith Baldwin and John C. Bredell were partners in trade. John C. Bredell died January 5th, 1853, leaving a will, which was duly admitted to probate, by which Edward Bredell was appointed his executor. Said Edward Bredell received letters testamentary, dated January 15, 1853. On the 6th of April, 1853, he gave bond as surviving partner under sections 59 and 51 of the first article of the administration act of 1845, (see R. C. 1845, p. 70,) and undertook the management of the partnership property. This action was brought for a breach of the condition of said bond by said Baldwin in not paying, out of the partnership effects which came into his hands as surviving partner, a debt due from the firm to said John C. Bredell, deceased.

The cause was tried by the court without a jury. Evidence was introduced tending to prove substantially the following facts: Baldwin, as surviving partner, took into his possession and under his management property of the said firm to the amount of \$4,081.11; that of said property there remained in his hands, after deducting disbursements, on the 22d of March, 1856, the sum of \$3,566.16. On that day Baldwin appeared in the probate court and exhibited his account for the final settlement of the concerns of the partnership. The following is an entry of that date in the records of said court: "Smith Baldwin, surviving partner of the firm of Bredell & Baldwin, appears and exhibits his account for the final settlement of the concerns of said co-partnership; whereupon the court examines and finds that at his last settlement with the court there was a balance against him in favor of said estate of \$3,759.91; that no assets since came to his hands, and he is entitled to credits in the sum of \$193.75, leaving a balance in his hands in favor of said co-partnership of \$3,566.16; and the court apports said balance as follows: To Smith Baldwin, \$1,783.08; and the court sets aside the order of payment made on the fifteenth of this month, and apports to the estate of John C. Bre-

State, to use of Bredell's Exec'r, v. Baldwin.

dell, deceased, \$1,783.08, and orders that he pay the same without delay to the executor of said deceased, and on the production of his receipt therefor he will be finally discharged."

The evidence also showed that at the death of Bredell the firm of Bredell & Baldwin was indebted to him in the sum of \$8,297.44 for moneys advanced to said partnership in the course of its prosecution of its business, before the death of said Bredell, over and above the capital he was required to put into partnership. This sum was reduced after the death of Bredell to the sum of \$5,524.50. Baldwin did not, in any account rendered by him as surviving partner, include said debt of said firm to Bredell, nor did he apply any part of the property of said copartnership that came into his hands to the payment of said debt. Said debt still remains due and unpaid. After the commencement of this suit the defendant tendered to plaintiff the one-half of the said balance of \$3,566.16, which plaintiff refused to receive.

The court ruled that the above "order of the probate court of St. Louis county was final and conclusive upon the said Edward Bredell, as executor of the said John C. Bredell, as to the proportion to which he was entitled as such executor of the balance of \$3,566.16 in the hands of said Smith Baldwin as surviving partner of the firm of Bredell & Baldwin, and that the plaintiff could recover in this action only the amount ordered by the probate court to be paid to the said executor, with interest."

The plaintiff thereupon suffered a nonsuit with leave to move to set the same aside.

Drake, for plaintiff in error.

I. The court misconceived the nature of this action. The plaintiff did not sue to recover a distributive share of the partnership effects after the payment of partnership debts. He seeks the payment of a debt which the surviving partner was by the terms of his bond bound to pay. The executor was entitled to the payment of the debt of the firm. He had

State, to use of Bredell's Exec'r, v. Baldwin.

a specific lien on the partnership effects. (Coll. on Part. § 125; Sto. on Part. § 97.)

II. The order of the probate court is no defence. The executor was in no way a party to the order of the court. (1 Greenl. Ev. § 523.) The probate court had no jurisdiction to make an order of distribution between the surviving partner and the executor of the deceased partner. Its action in that respect was wholly extra-judicial and void. The act of 1845 does not authorize the probate court to exercise authority over the surviving partner, except to cite him to account and to adjudicate upon his account. This does not include a power to order distribution between the surviving and the executor of a deceased partner.

H. N. Hart, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was not brought to recover the distributive share coming to the estate of the deceased partner on a final settlement of accounts after the payment of all partnership liabilities, but it is to recover a debt alleged to be due to the estate of the deceased partner by the late firm of which he was a member, on the ground that the surviving partner has partnership assets in his hands subject to be appropriated to the payment of the debt. One partner may be the creditor of a firm of which he is a member, and has a right to require payment out of the partnership assets like other creditors before they are divided and before either of the partners can claim any right thereto. Until all the partnership debts are paid neither partner has a right to withdraw any thing on account of capital or profits, but all that remains, after the payment of the claims of other creditors, will be charged in equity with a lien for the payment of any debt due to either of the partners. One of the conditions of the bond required to be executed by a surviving partner who undertakes to wind up the partnership affairs is, that he will apply the assets to the payment of the partnership debts; and no reason

Woods v. Timmerman.

is perceived why the personal representative of a deceased partner, who is a firm creditor and whose debt is properly ascertained, may not sue upon the bond for a breach of this condition.

The settlement which the defendant made with the probate court was *ex parte*; no notice was given as required as in case of administrators; and as the court had no means of knowing, except from the defendant's statement, that all the debts had been paid, it would be unjust to give to such a settlement the effect of silencing every unpaid creditor. In ordinary cases of administration the creditors are required to prove their demands before the court, and all claims are barred which are not presented within three years, so that when an administrator, after giving notice of his intention to make a final settlement, appears for that purpose, the record would show every creditor of the estate, and the court has the means of knowing, before making an order of distribution, that all the debts have been paid. But not so in a case like this, for the law does not require partnership demands to be allowed by the court; the surviving partner is not required to give notice of his intention to make a settlement, and the court has no means of knowing by proof or otherwise that all the debts have been paid.

The instruction therefore which the court gave that the settlement made by the defendant was final and conclusive upon the executor of the deceased partner, we think, was erroneous, and for that reason the judgment will be reversed and the cause remanded. The other judges concur.

WOODS *et al.*, Respondents, v. TIMMERMAN'S ASSIGNEE, Appellant.

1. Assignments for the benefit of a portion of the creditors of the assignor are valid notwithstanding section 39 of the act concerning voluntary assignments; that section operates to overthrow all provisions in assignments giving preferences among the designated creditors.
2. A provision in an assignment providing for the payment of a particular debt of a designated creditor would be valid.

Appeal from St. Louis Circuit Court.

Francis Timmerman made an assignment of his effects to William Muir for the benefit of his creditors. In the schedule annexed to this deed the claim of the plaintiffs is thus described: "*Names*—Messrs. Woods, Christy & Co.; *Residence*—Main street, St. Louis; *Class*—Two notes; *Amount*—\$554.55." Timmerman was further indebted on a note for \$3,130.50, payable to the order of one of the plaintiffs individually, but which was claimed to belong to the firm of Woods, Christy & Co. This note was mentioned in the deed of assignment. It was secured by a deed of trust executed by Timmerman on certain leasehold property in St. Louis. Plaintiffs sold the leasehold under the deed of trust and were paid out of the proceeds, on account of said note, \$1,476.57. They afterwards presented the note, with the balance due on it, to the assignee for allowance and payment under the assignment. It is admitted that the proceeds of the assets assigned will pay the creditors mentioned in the schedule a dividend of less than fifty per cent., even should the plaintiffs claim on this note not be allowed. The assignee certified the claim to the circuit court. A jury, on an issue submitted to them, found that the note, though made payable to an individual member of the firm, was the property of plaintiffs. The plaintiffs moved the court to grant an order requiring the assignee to allow the claim of the plaintiffs on said note for \$3,130.50, and to a *pro rata* dividend on the balance due thereon. The court granted the motion and required the assignee to allow the claim and pay it *pro rata* with the other claims.

Shepley and P. B. Garesché, for appellant.

I. The assignment of Timmerman was for the purpose of paying certain specified creditors certain specified debts. No provision is made for paying any other debts of the grantor than those named. The note of \$3,130.50 was not included in said assignment and can take no benefit from the property assigned.

Woods v. Timmerman.

S. T. & A. D. Glover, for respondent.

I. It was the duty of the assignee "to adjust and allow the demand" of the plaintiffs. (R. C. 1845, p. 130, § 16.) The assignee not doing so that duty devolved on the circuit court. The deed of assignment could not fix the amount of plaintiffs' demand. The assignor had no power so to conclude the matter, nor could the assignee and plaintiffs conjointly. What was owing in point of fact was a question to be investigated and decided by legal evidence, and this was to be done, in contemplation of the law, in defence of the deed and the agreement of the assignor, assignee, and the beneficiary specially concerned. The assignor could not put the plaintiffs' demand higher or lower than it was in fact. He could neither enlarge nor diminish the plaintiffs' demand. It was the duty of the court to ascertain the debt due independently of the way in which it had been fixed by the assignor. The purpose of the assignor was manifestly to divide his property *pro rata* among all his creditors.

NAPTON, Judge, delivered the opinion of the court.

It has been heretofore determined that, under our recent statute concerning assignments, debtors may still prefer some creditors over others, although they can not make distinctions between the preferred claims. Such a construction, although falling far short of the goal which the legislature appeared to be arriving at in the 39th section of the law, was rendered necessary by other provisions suffered to remain in the statute. If preferences are allowed as to the individual creditors, there is no reason why the same preferences may not be made with reference to the debt as to the individual who holds it. A debtor may choose to protect a particular debt, as for example a security note, in preference to other debts due the same individual. We can see no reason of public policy which will permit the one and exclude the other.

This being the law, it becomes a mere question of intent in

Woods v. Timmerman.

the construction of the instrument of assignment, as to whether the claim of Woods, Christy & Co. upon the note for \$3,130.50 was one of those provided for in the assignment. The facts show very clearly that it was not. Woods, Christy & Co. were preferred on an indebtedness by two notes amounting to \$554.55. These two notes, exactly to this amount, were presented and allowed. But Timmerman, the debtor, had also given his note to Woods (one of the firm), which was endorsed by Christy (another member), and this note was secured by a mortgage on leasehold estate. It appeared that the note was really owned by the firm of Woods, Christy & Co.; that it was given for goods bought by Timmerman of that house, and that the note was merely made to assume the form it did as a matter of convenience. It also appeared that only about half the note had been realized from the mortgaged property; but it further appeared that the mortgaged property was not included in the assignment, and that the property and effects assigned would not pay more than fifty cents on the dollar of the claims named, exclusive of this claim of W., C. & Co.

Under these circumstances it is very plain that Timmerman had no intention of working any provision for this note of \$3,130.50. He does not mention it, but names two other notes and their exact amount. The only question, it seems to me, is, whether a debtor can select particular debts, as he undoubtedly can select particular creditors. The statute does not prevent this, and before the statute there could be no doubt on this question. In fact the language of the 39th section appears to recognize the law as above stated; it says, "and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof."

Judge Scott concurring, the judgment is reversed; Judge Richardson not sitting.

State v. McLaughlin.

THE STATE, Defendant in Error, v. McLAUGHLIN, Plaintiff
in Error.

1. An application for a new trial on the ground of newly discovered evidence should, as a general rule, be accompanied by the affidavit of the party seeking the new trial; the affidavit of a third person should never be received without an explanation of the reason why the party himself omitted to make it.

Error to St. Louis Circuit Court.

J. W. Sharp, for plaintiff in error, cited 14 Johns. 294; 18 Mo. 321; 22 Conn. 156; 17 Wend. 460; 1 Hill, 94; 5 Gilm. 305; 1 Hawk P. C. 33; 7 M. & W. 623; 1 Hale, 506.

Mauro, (circuit attorney,) for the State.

RICHARDSON, Judge, delivered the opinion of the court.

It is sufficient to say, without analyzing the instructions that were given, that they presented the law of the case fairly to the jury, and on the hypothesis that the defendant found the pocket-book the law was stated in conformity to the opinion of this court in the case of the *State v. Conway*, 18 Mo. 321. The instructions asked by the defendant were properly refused because the principle contained in the first was covered by one already given, and the second was wrong because it assumed that larceny can only exist where the property stolen is taken from the possession of the owner, and excluded the idea that larceny can be charged in any case where the defendant acquires possession of property by finding it.

The motion for a new trial on the ground of newly discovered evidence was supported by the affidavit of the defendant's attorney and of the discovered witness, but the defendant personally did not make any statement or affidavit on the subject, and no reason is given for the admission. There are no doubt cases in which the affidavit that accompanies a motion for a new trial on account of newly discovered evi-

dence may properly be made by the attorney or some other person representing the party, but the general rule is that the party himself must make the affidavit, and the circumstances that would authorize an exception to the rule ought to appear. Applications for new trials on the ground of evidence discovered after the trial are entertained with reluctance because of the temptation to parties smarting under defeat to make them, and on account of the facility with which plausible grounds are manufactured. A party may be very willing to take the chances of a new trial, but unwilling or afraid to swear to a statement necessary to procure it; and the loosest practice would be established to permit the oath of another to be substituted for the oath of the party himself. He may make a statement to his attorney which the latter might conscientiously swear he believes to be true, which, in point of fact, is false, and hence the affidavit of a third person should never be received without an explanation of the reason why the party omitted to make it. The courts, therefore, to protect themselves from imposition, require such motions to be supported by the affidavit of the party and the observance of other requisites which are well stated in *Berry v. State of Georgia*, 10 Ga. 527, as follows: The party must show, 1st, that the evidence has come to his knowledge since the trial; 2d, that it was not owing to the want of due diligence that it did not come sooner; 3d, that it is so material that it would probably produce a different result if the new trial were granted; 4th, that it is not cumulative only; 5th, that the affidavit of the witness himself should be produced, or its absence accounted for; and, 6th, that the object of the testimony is not merely to impeach the character or credit of a witness.

In this case the defendant was not absent, and he knew better than any other person when the evidence stated to have been discovered first came to his knowledge, and what diligence he had used before the trial to obtain it. The affidavit of Susan Taylor discloses facts which would probably have produced a different result, and if the motion had

Slowey v. McMurray.

contained the necessary requisites, the defendant ought to have had a new trial; but to allow it under the circumstances of this case would be at the expense of overthrowing established rules and would introduce a practice dangerous to the administration of justice.

Judge Napton concurring, the judgment will be affirmed.

SLOWEY, Plaintiff in Error, v. McMURRAY *et al.*, Defendants
in Error.

1. The test by which to determine whether a transaction is a mortgage or a conditional sale is this: if the relation of debtor and creditor remains and a debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases by a given time and thereby entitling himself to a reconveyance, it is a conditional sale.
2. If the transaction is a conditional sale, the party seeking a reconveyance to himself must strictly comply with the conditions imposed upon him.

Error to St. Louis Land Court.

The petition in substance sets forth that on the 14th day of August, 1855, plaintiff was the owner of a certain lot in the city of St. Louis; that he held the same subject to an encumbrance by deed of trust to secure two notes—one for \$616, payable in twelve months—the other for \$682, payable in twenty-four months from date; that when said note for \$616 became due he was unable to pay the same; that McMurray loaned plaintiff \$300, plaintiff agreeing to pay interest thereon at the rate of two and a half per cent. per month for the period of six months; that he gave his several promissory notes to said McMurray for the sum thus loaned; that he delivered to said McMurray \$316, with which, together with the money loaned as above stated, he, McMurray, paid the said note of \$616 when it became due, and took and kept possession thereof; that, at or about the time the notes executed by him in favor of McMurray fell due, he paid to him

Slowey v. McMurray.

\$200 and took up two of the notes given by him ; that, when the note for \$682 became due, he, plaintiff, failed to pay the same, and the trustee advertised the lot in controversy for sale and proceeded to sell the same ; that at and before this sale it was agreed between plaintiff and McMurray that plaintiff should remain in possession of the premises, and that McMurray should bid in the same in his own name for the benefit of plaintiff Slowey and pay said note of \$682, and that, if plaintiff would pay back to said McMurray said sum of \$682 and also pay him the sum of \$150, the balance remaining due and unpaid of said notes made and delivered as above stated by plaintiff to McMurray, within one year from the date of said sale, said McMurray would reconvey said premises to plaintiff ; that said McMurray bid for said premises at the trustee's sale on the 14th of August, 1855, the sum of \$1,005, and received the trustee's deed therefor ; that in pursuance of said agreement the plaintiff remained in possession of the premises intending in good faith to fulfill and perform said agreement ; that on the 11th day of October, 1855, he paid McMurray forty dollars in part discharge of the sum of money which he had agreed to pay to said McMurray ; that on the 17th day of November, 1855, McMurray sold the premises to one Ackerman for \$1,100 ; that Ackerman took with notice ; that at the date of the trustee's sale the whole indebtedness of plaintiff amounted to \$840.36 ; that plaintiff on the 14th of August, 1856, said McMurray being absent from his place of business and out of the state, offered to pay to the wife of McMurray \$1,000, being more than the sum due McMurray ; that he went to McMurray's place of business for the purpose of paying what was due and of demanding a deed ; that said lot was worth \$2,000 ; that at the trustee's sale the plaintiff had procured the attendance of other persons and had made arrangements with them to purchase in the property for him, but he had been induced by McMurray to enter into the agreement above set forth.

The plaintiff prayed the court to annul the deed to Ackerman ; that defendants be required to convey to plaintiffs upon

Slowey v. McMurray.

the payment of the debt due to said McMurray; that if the court should not order the deed to be cancelled judgment be given against McMurray for the sum of \$323, the overplus (with interest) of said McMurray's bid after paying the sum of \$682, also for \$995, what the land and improvements were really worth over and above the sum of \$1,005 bid by McMurray, &c.

Evidence was introduced tending to support the allegations of the petition. The case was tried by the court without a jury. At the close of the testimony the court gave the following instruction or declaration of the law: "On the evidence in this cause the plaintiff can not recover."

S. T. & A. D. Glover and Wingate, for plaintiff in error.

I. McMurray was a mortgagee. (12 Mo. 30; 1 Hoff. Ch. 31; 8 Paige, 243; 1 How. 118; 17 Mo. 61.) The transaction did not cease to be a mortgage simply because Slowey did not pay the debt as by agreement. (6 Gill & Jo. 275; 12 How. 151; 8 Paige, 243.) McMurray had no right to sell the land without foreclosure. (3 Dev. Eq. 234; 6 Ired. Eq. 39; 1 Paige, 618.) Having done so he must account for the value of the plaintiff's interest in it. (1 Litt. 84.) The usurious interest paid by Slowey was a lawful credit on on his debt. (3 Dana, 595.)

I. Z. Smith, for respondent McMurray.

SCOTT, Judge, delivered the opinion of the court.

As the light in which this and contracts similar to that involved in this suit should be regarded is a matter of some importance, and as cases of this kind are not of unusual occurrence, it may be as well to look a little into this matter.

We do not well see how the transaction between these parties can be regarded as a mortgage or a quasi mortgage, or how the law of mortgages is applicable to it. It may be premised that contracts of this kind are narrowly watched, and courts lean strongly in favor of the right of redemption.

Slowey v. McMurray.

Chancellor Kent says, that the distinction between a mortgage and a bill of sale is, that, if the relation of debtor and creditor remains and a debt still subsists, it is a mortgage; but if the debt is extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding if he pleases by a given time and thereby entitling himself to a reconveyance, it is a conditional sale. (4 Kent Comm. 145.) In the case before us we conceive that the relation of debtor and creditor had ceased to exist between the parties. The debt between them was extinguished. After the execution of the deed by the trustee to McMurray there was no evidence of any debt due by Slowey to McMurray. The witness Vogel proves that he delivered all evidences of indebtedness on the part of Slowey to McMurray to Slowey. McMurray then no longer had any remedy against Slowey. No remedy existed, nor was it reserved in terms. If the property had proved insufficient to pay the debt which it is maintained existed between the parties, and McMurray had brought a suit for a foreclosure with a view to obtain the balance of his debt after exhausting the mortgaged premises, how would he have stood in a court, with the denial of Slowey that the transaction was a mortgage backed by an absolute deed, and with no evidence of any indebtedness on the part of Slowey? Can we suppose that a mortgage was contemplated under such circumstances? In the case of *Brant v. Robertson*, 16 Mo. 146, the point of inquiry was, whether Brant held the notes of Robertson by assignment from Ford, and, if he did not, whether he advanced the money to Ford in payment of the notes upon any express undertaking of Robertson to pay the money otherwise than by forfeiting his interest in the property. Here the notes were given up to Slowey, and it is not claimed in the petition that the payment and reimbursement of the money was to be made with any other view than to obtain a reconveyance. Under our law, which, as it is understood, allows an absolute deed to be converted into a mortgage, without the averment of any accident, fraud, or mistake,

Slowey v. McMurray.

what security for titles would there be if such verbal promises should be maintained to convert absolute deeds into mortgages? (*Glover v. Payn*, 19 Wend. 518; *Robinson v. Cropley*, 2 Edwards Ch. 138.)

The case of *Russell v. Geyer et al.*, 4 Mo., did not arise between the debtor or owner of the property sold and the purchaser. That was a bill by a creditor to subject the interest it was alleged his debtor had acquired by reason of a promise to him that he should redeem. The court held that after the expiration of the time agreed upon for the redemption there was no interest in the debtor which could be subjected to an execution. In the case of *Flowers v. Sproule*, 2 A. K. Marshall, 509, it was held that a purchaser at a sheriff's sale, promising to return the property to the debtor if the money given is repaid by a certain day, can not be obliged to do so if the money is not punctually paid. It was also held that such a promise was without consideration. In the case of *Getman v. Getman*, 1 Barb. Ch. 499, real estate was sold under an execution, and the purchaser at the sheriff's sale sold his bid to two other persons, who advanced the money therefor upon an agreement between them and the wife of the judgment debtor that her children should have six years to refund the purchase money and interest, and have a conveyance of the property; it was held that this was a mere agreement with the mother to sell the property to her children at any time within the six years for the purchase money and interest, and that, as there was no agreement on the part of the mother or children to take the property and pay for it within that time, it was an agreement without any consideration to support it, and was therefore invalid; and it was held that it was an agreement required to be in writing within the statute of frauds, even if there had been sufficient consideration to support it. We do not regard the case of *Heister v. Madeira*, 3 Watts & Serg. 384, as conflicting with those above cited. In that case there was a mutual agreement in writing, signed by the parties before the sale, in which, among other things, it was stipulated that the cred-

itor in the execution should buy and hold the land of the debtor in the execution at the sheriff's sale, and a small sum in comparison with the value of the estate was agreed upon as that at which it should be bid in. There was an unadjusted account between the parties, which was to be settled within three months, and the balance due was to be paid within that time. The greater portion of the debt due on the execution was paid and a receipt for it was endorsed on the agreement. The money not having been paid within the time, the creditor claimed that the deed was absolute. The court regarded the transaction as a mortgage or deed of trust and permitted the heirs of the debtor in the execution to recover the value in money of the interest of their ancestor in the land, as it had been conveyed away by the creditor. As the sum was fixed by the parties at which the land should be bought in, as that sum was greatly below the value of the land as was shown by the debtor's payment at the time of the agreement, causing a great disparity between the value of the land and the sum for which it was sought to be held, and as there was a stipulation in the agreement by the debtor to pay the balance, we can see nothing in the case which impairs the force of those stated in this opinion.

There is another class of cases growing out of the conduct of debtors and purchasers at public sales. This is where the purchaser becomes such under such a state of facts as would make it a fraud to permit him to hold on to his bargain. As if a purchaser, by means of a promise to reconvey to his debtor, should induce a relaxation of the efforts on his part to prevent a sacrifice of his property and thereby obtain it at an under price, or, if the purchaser, taking advantage of that reluctance invariably manifested by those attending public sales to interfere with any arrangement a debtor makes to save his property, should create an impression that he was buying for the debtor, thereby preventing competition, or by any other improper means obtains the property of a debtor at a sacrifice, such conduct would convert the purchaser into a trustee for the benefit of those who were defrauded by his

Slowey v. McMurray.

conduct. Such cases go upon the ground of fraud, and courts will give relief without regard to the circumstance whether the agreement was a written or a verbal one, or whether it was supported by a consideration or not. Such are the cases of *Rose v. Bates*, 12 Mo. 30; *Estill v. Miller & Estill*, 3 Bibb, 177.

The cases seem to establish these principles: that a promise by one purchasing the property of a debtor at a public sale to reconvey to him must be supported by a sufficient consideration, and, if the subject of the sale is real estate, the promise must be in writing, to take it out of the provisions of the statute of frauds; that such promises, when made under circumstances like those in this case, even when valid and binding, are regarded as conditional sales, and not as mortgages, and the party insisting on their performance must himself comply with the conditions imposed on him.

Making an application of these principles to the case before us, it will be seen that the contract or promise made by McMurray, even if binding in law, constituted the transaction a conditional sale and not a mortgage; that the party plaintiff not having complied with the terms of the sale, he can not insist on a reconveyance of the lot; that the instruction asked by the plaintiff was tantamount to a request to decide the cause in his favor, and as there was no jury, the court itself hearing the cause, we are not of the opinion that the court erred in refusing the request; we are not of the opinion that the pleadings and evidence in the cause warranted any such instruction. The instruction given was nothing more than the judgment of the court upon the whole case after it had been submitted. No instruction was asked seeking the opinion of the court as to the effect of any fraud in the transaction. The sum at which McMurray resold the lot is a strong circumstance in this case. It is not pretended that the sale was a feigned one.

The question of usury was not raised by the pleadings, and the petition is not framed with a view to obtain any relief under the statute against usury.

As the contract to reconvey was rescinded, the defendant should have restored the forty dollars received under it. There is no error complained of on the score of this omission, but as the plaintiff says that he was to remain in the house, and pay interest on the money, and the defendant says he was to pay twenty-five dollars a month for the privilege of remaining in the house, we may take it that the forty dollars was received as rent. Affirmed; Judge Richardson not sitting. Judge Napton concurs.

THE STATE, Respondent, v. HARMAN, Appellant.

1. It is no infringement of that provision of the constitution giving the accused the right in all criminal prosecutions to meet the witnesses against him face to face to receive in evidence against the defendant in a criminal prosecution a deposition taken before the committing magistrate in the presence of the accused—the deponent being dead at the time of trial.

Appeal from St. Louis Criminal Court.

C. C. Carroll, for appellant.

Mauro, (circuit attorney,) for respondent.

NAPTON, Judge, delivered the opinion of the court.

The question in this case is the same that was determined in the cases of McO'Blenis and Baker, 24 Mo. 402.

The deposition is also objected to as irrelevant and unintelligible. The deposition simply proved that the deponent Melvin (since dead) found a certain watch about the person of the prisoner—a watch which the deponent says was the same watch spoken of by a witness named English on the examination before the recorder. This English was a witness on the trial also and declared the watch he testified about to be the same alluded to by Melvin. We see nothing irrelevant in the deposition, nor any thing unintelligible.

State, to use of Tebbe, v. Wightman.

The deposition was in point, if for no other purpose, to prove that a watch was found in possession of the prisoner, and the subsequent testimony of English conduces to show the materiality of that fact. Whether the identity of the watch found by the officer with the one spoken of by the witness was fully made out, was a question for the jury. The other judges concurring, the judgment will be affirmed.



THE STATE, TO THE USE OF TEBBE, Respondent, v. WIGHTMAN *et al.*, Appellants.

1. A new trial will not be granted on the ground of surprise where the object in obtaining the same is the introduction of evidence of a character merely cumulative.

Appeal from St. Louis Court of Common Pleas.

T. C. Johnson, for appellants.

I. The court should have given the instructions asked by defendants.

II. The verdict was against the evidence in the case.

III. The court should have granted a new trial on the ground of surprise as fully disclosed in the affidavit. (2 R. C. 1855, p. 1285, art. 13, § 3; 3 Graham & Wat. on New Trials, 875.)

Kribben, for respondent.

RICHARDSON, Judge delivered the opinion of the court.

The instructions given by the court presented the questions of law in the case fairly to the jury. The plaintiff could stand on his possession until the integrity of his position was assailed, and could rely on the familiar principle of law that the possession of personal property raises the presumption of ownership; and the allegation in the defendant's answer that the plaintiff's possession was fraudulently obtained was insufficient, without evidence, to shift the burden of proof.

Cohen v. Kyler.

Surprise is a ground for granting a new trial, but it is not regarded with favor by the courts. It is the duty of parties, in the preparation of their cases, not only to know what evidence they need, but what their witnesses will most probably prove, and a new trial will not be granted if the surprise is the result of negligence or could have been avoided by reasonable diligence. (3 Graham & Wat. New Trials, 876.) This is not the case of a party's own witnesses betraying him or the adversary's witnesses swearing falsely, for it is not averred that the defendants' own witness deceived him, or that the plaintiff's witness stated an untruth, but that he omitted from forgetfulness to state a fact which was proven by one witness without contradiction, and which the defendant states he could have proved by another if he had supposed the plaintiff's witness had forgotten it; and that he could have secured the attendance of another witness if he had not relied on the memory of the plaintiff's witness. If he was willing to go to trial in the absence of one of his witnesses, relying on the plaintiff's witness to corroborate his own, he ought to have taken some pains to have ascertained beforehand that his recollection was refreshed. The fact which the witness forgot was proved by another, and the object in getting the new trial would be to introduce cumulative evidence, which is never allowed. (State v. Stumbo, 26 Mo.; 3 Gra. & Wat. New Trials, 1046.) The judgment will be affirmed, the other judges concurring.

COHEN, Respondent, v. KYLER, Appellant.

COHEN, Plaintiff in Error, v. KYLER, Defendant in Error.

1. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied.
2. A bathing tub and lead water pipes fastened to the walls and floor of a building by nailing are fixtures as between a vendor and vendee.

Appeal from, and Error to, St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

Krum & Harding, for Kyler, cited Woodf. Land. & Tenant, 432, 607; 3 Mo. 286; 1 Term, 378.

H. N. Hart, for Cohen.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff brought an action against the defendant for the use and occupation of a dwelling house, and for damages, alleging that the defendant wrongfully took down and carried away fixtures that belonged to the plaintiff, to-wit: "Sundry lead pipes and plumbing work, bath tub, two sinks and waste pipe." It appears from the bill of exceptions that the defendant, for the purpose of securing the payment of a debt, executed a deed of trust conveying a lot and dwelling house in the city of St. Louis, and authorized the trustee, in the event of a failure to pay the debt, to sell the property. Default having been made in the payment of the debt, the trustee, pursuant to the terms of the deed, advertised and sold the premises described in the deed on the 12th of November, 1856, and the plaintiff became the purchaser and received a deed. The defendant was in the occupation of the house at the time of the sale, and remained in possession for more than two months against the plaintiff's consent. "It was admitted that the defendant never attorned to the plaintiff or agreed to pay rent to him for said premises. The plaintiff also proved that after the said sale of said premises to plaintiff and while defendant occupied the same he unfastened, broke loose, removed and carried away from said premises certain lead water-pipes and a bathing tub, which pipes before and at the time the defendant removed them were fastened to boards, and the boards with the pipes fastened to them were nailed to the walls, and the bathing tub in like manner was fastened to the wall and floor."

Two questions arose on the trial, first, whether the plaintiff

was entitled to recover on the count for use and occupation, and, secondly, whether the articles removed by the defendant were fixtures which belonged to the plaintiff and which the defendant had no right to take away. The court ruled the first point against the plaintiff, to which he excepted, and sued out a writ of error. The other point was decided against the defendant, and he has brought the case into this court by appeal.

It is sometimes difficult to determine whether the facts of a case create a tenancy, but we are relieved from that embarrassment in this instance by the admission in the record that the defendant never recognized the plaintiff as his landlord, and never agreed to pay him rent for the premises. Without this admission, however, the character of the defendant's possession is so apparent that the relations of the parties to each other do not necessarily suggest a tenancy, and a promise to pay rent would not be implied. The doctrine is well settled that the action for use and occupation can not be maintained unless the relation of landlord and tenant subsists between the parties founded on an agreement express or implied. (*Hood v. Mathis*, 21 Mo. 308; *Bancroft v. Wardwell*, 13 John. 488.)

As a general rule an article is a *fixture* which is annexed or fastened to a freehold, but the term is not always used in the same sense; for the same thing which would be a fixture and not removable, as between some persons holding a particular relation to each other, would not be a fixture as between other persons. Public policy at an early day induced a relaxation of the old rule, for the encouragement of trade and manufactures, and the indulgence has been extended in favor of agricultural pursuits, and at this day a wide latitude is allowed in all cases between landlord and tenant in favor of the claims of the latter to treat as personal chattels articles put up for his own comfort or convenience. Lord Ellenborough decided in the leading case of *Elner v. Maul*, 3 East, 38, that as between heir and executor the rule obtains with the utmost rigor in favor of the inheritance and against

Picot v. Signiago.

the right to dis-annex therefrom, and to consider as a personal chattel any thing which has been affixed thereto; and the same rule exists between vendor and vendee; so that unless there is a stipulation to the contrary common fixtures will pass by the deed to the purchaser. (Plumb v. Miller, 6 Cow. 665; Kirman v. Latour, 1 Har. & J. 289; Preston v. Briggs, 16 Verm. 124; 1 Sug. Vend. 37.)

The necessary pipes for conducting water through the apartments of a dwelling house and into a bath-room add greatly to the value, comfort and convenience of the building, and a purchaser who appreciated such things would be sadly disappointed after he had received his deed to find the house stripped of such fixtures. In our opinion the articles taken away by the defendant were fixtures which passed by the deed to the vendee, and the other judges concurring the judgment will be affirmed.

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PICOT, Respondent, v. SIGNIAGO, Appellant.

1. A. contracted to build for B. a house; C. and A. agreed to secure B. against all liens, claims and losses. Liens were filed by sub-contractors against said house upon which writs of *scire facias* were issued against A. and B. These writs were served upon B., the owner, but not upon A. Judgments by default were rendered against B., which he paid. *Held*, in a suit instituted by B. against C. to recover damages for the breach of the agreement above referred to, that the records and proceedings in said suits against B. were admissible in his favor to show the amount of the judgments, and the payment of them by him. The judgments were not, however, conclusive upon C.
2. Judgments in enforcement of liens against A. and B., upon service of process upon both, would be conclusive upon C.

Error to St. Louis Court of Common Pleas.

The case has heretofore been before the supreme court. For a statement of the facts see the report of the decision of the supreme court, 22 Mo. 587. On the second trial the plaintiff, Louis G. Picot, introduced in evidence, against the objection of defendant, the records and proceedings in vari-

Picot v. Signiago.

ous suits instituted in the St. Louis circuit court, by various parties, against said Picot and Porter Bush, to enforce liens against the building contracted to be built by said Bush for said Picot. From these it appeared that the plaintiffs in said suits (contractors under Bush) had filed in the clerk's office of the St. Louis circuit court their demands for the purpose of completing their liens; that writs of *scire facias* were issued in each case against said Picot, the owner, and said Bush, the contractor; that there was no service of process upon Bush, nor had he any notice of the various proceedings; that Picot failed to appear, and judgments by default were rendered against him, and orders of execution were made against the market-house. These judgments Picot paid. The court also admitted in evidence, against the objection of defendant, transcripts of entries in the docket of justice Kitzmiller showing judgments against Porter Bush in various suits instituted to recover demands accruing to the several plaintiffs as sub-contractors or material men under Bush, and which they had filed as liens. Picot voluntarily paid these judgments.

The defendant offered to prove that at the time of the agreement between Bush and Picot it was agreed and understood that Signiago was only security for Bush; that at the time of the filing of the lien against the market-house and all the subsequent proceedings said Bush was out of the state, and that there was never any service had upon him in any case whatever; that he did not owe any one of the parties to the liens against the market-house any sum whatever when he left the state. The court ruled out this testimony.

The court, among other instructions, gave the following: "If the jury find that before the commencement of this suit the plaintiff paid the judgments read in evidence rendered in the circuit court of St. Louis county and by the justice of the peace, they will find for the plaintiff the amounts so paid and costs paid on said judgments and proceedings, less the sum plaintiff still retained in his hands."

The jury found for plaintiff.

Picot v. Signiago.

H. N. Hart, for appellant.

I. Bush was not a party to the proceedings by *scire facias*. No judgment could properly be rendered against Picot. (*Wibbing v. Powers*, 25 Mo. 599.) The judgments against Picot were not valid liens. Signiago was not a party to the proceedings against Bush and Picot. He ought not to be made to pay Picot what neither he nor Bush had an opportunity to contest.

II. The court below ought to have excluded the transcripts of the justice. They were general judgments and not judgments such as are required under the lien act. (R. C. 1845, p. 735; Sess. Acts. 1843, p. 84.)

III. The court erred in excluding the evidence offered by defendant.

L. G. Picot, for respondent.

NAPTON, Judge, delivered the opinion of the court.

We do not perceive upon what ground the judgments in the circuit court against Picot by default were held conclusive upon Signiago. His principal, Bush, was not a party to the proceedings. The record shows that he had no notice. Picot had unquestionably the right to pay the sub-contractors without suit, if he was satisfied of the justice of their claims, and if he was willing to assume the responsibility of establishing their validity in the event of a question between him and the principal contractor. In what respect does he occupy a different position by letting judgments go against him by default, Bush not being a party? These records were evidence to show the facts established by them, the amount of the judgments, and the payment of them by Picot. They were not however conclusive on the contractor or his security, because they were not parties to them. The evidence offered by the defence, to show that these claims had been paid or were not justly due, should have been received.

In relation to the judgments before Justice Kitzmiller, the

Ridgley v. Stillwell.

case is different. The records show a service upon Bush, and this he (nor his security Signiogo) can not contradict, at least in the collateral way. When filed in the circuit court according to the provisions of the local statute (Acts of 1843, § 7,) they became liens upon the property; and as Picot, the owner, could not dispute their validity, they are conclusive upon Signiogo now. So far as these latter judgments are concerned we see no error in the action of the court.

Judge Scott concurring, the judgment is reversed and the cause remanded. Judge Richardson not sitting.

RIDGLEY, Respondent, v. STILLWELL, Appellant.

1. A judgment recovered is conclusive as between the parties thereto as to all matters directly in issue.
2. This rule does not extend to matters collaterally or incidentally considered.
3. In the absence of any agreement or understanding between a landlord and his tenant the rent will be payable yearly and at the end of the year.

Appeal from St. Louis Land Court.

The amended petition in this case states that the defendant, Stillwell, entered on certain premises in St. Louis as the tenant of the plaintiff Ridgley; that he continued to occupy the same during the year ending February 15, 1857, and was indebted to the plaintiff for the use and occupation thereof for the year aforesaid; that when the defendant took possession he agreed to pay the plaintiff rent therefor, and by virtue of said tenancy and agreement became liable to pay the plaintiff \$700 for the use and occupation of the premises for the said year; that the defendant agreed to pay the rent in monthly instalments and the taxes that might be assessed thereon.

The defendant in his answer admitted the occupation of the premises, but denied that he became liable to pay \$700 therefor, or that he agreed to pay the rent monthly or the

Ridgley v. Stillwell.

taxes, or that the year of his tenancy ended February 15, 1857. The answer further set forth a special agreement to the effect that on the 15th of March, 1851, the plaintiff agreed to let the premises to defendant for the term of ten years, to commence at that time, and to execute a written lease, in consideration of which the defendant agreed to pay annually an amount as rent equal to ten per cent. on the cost of the ground and fifteen per cent. on the cost of the building, and that pursuant to said agreement he went into possession on the 15th of March, 1851, and has remained in possession ever since; that the plaintiff has refused, though often requested, to exhibit the cost of the land and house, so that the amount of the rent could not be ascertained; that plaintiff had also refused to execute a written lease; that the rent estimated in the basis of the agreement would not exceed \$600 per annum; that the rent was to be paid annually on the 15th of March of each year during the term; that the year of defendant's tenancy had not ended when this suit was commenced—February 20, 1857.

On the trial the plaintiff introduced in evidence the record of another suit between the same parties, which was commenced 18th February, 1856, and on which a final judgment had been rendered. The petition in this suit contained three counts. The first was in ejectment for the possession of the premises on which a recovery was cut off by an instruction. In the second count it was averred that on the 15th of March, 1851, the defendant, by a verbal agreement, rented the premises of the plaintiff for \$700 per annum, payable monthly, and the taxes; that he occupied the premises under the agreement for three years ending March 15, 1854; that about 14th February, 1854, the defendant was notified that if he occupied the premises after the 15th March following he would be required to pay at the rate of \$800, monthly, and that the defendant continued in possession after the 15th of March to the time the suit was instituted. The third count was for use and occupation on a *quantum meruit*. It stated that the defendant became the tenant of the plaintiff on the

Ridgley v. Stillwell.

15th of March, 1851, and had remained in possession ; that the rent for three years ending March 15th, 1854, was of the yearly value of \$800, and that since then the rent has been of the yearly value of \$1,000. The defendant in his answer admitted that he was notified as is stated in the second count, but denied all the other material allegations in the petition and set up special matter substantially as is done in the answer to this action. The verdict of the jury in this case was as follows : " We, the jury, find for the plaintiff the amount of \$991.63, being the balance which we find due to said plaintiff for rent at the rate of \$700 per year."

Defendant objected to the introduction of this record. The defendant offered to prove that the letting of the premises described in plaintiff's petition was under a verbal agreement between the parties ; that the tenancy under said agreement began on the 15th day of March, 1851, and was for a period of ten years at an annual rent to be ascertained by computing ten per cent. on the cost of the building, and that the annual rent computed on these terms would not exceed \$600 per annum. The court rejected this testimony.

The plaintiff asked and the court gave the following instruction : " 1. If the jury find from the evidence that the defendant Stillwell, in a previous suit in this court between the plaintiff Ridgley and the defendant Stillwell for rent of the same premises under the same letting for the rent of which premises subsequently accruing this suit is instituted, interposed as a defence the same alleged agreement as that set up in his answer in this case (an agreement to lease said premises at a percentage on the cost of the ground and the cost of the buildings and improvements thereon) ; that the jury, on the issue made on said cause found that the defendant was a tenant of the plaintiff at the rent of \$700 per annum, and that there has been no change of the terms on which said premises were rented since the original leasing in the year 1851, then the defendant can not, in this suit, deny that such renting was at the rate of \$700 per annum."

The defendant asked the court to give the following in-

structions: "2. Unless there was an express agreement or understanding between the parties that the rent in question was to be paid monthly, it was payable annually—that is to say, at the end of each and every year, and the burden of proving that the rent was to be paid monthly rests on the plaintiff. 3. If the plaintiff let the premises described in his petition to the defendant under a verbal or unwritten agreement; if the tenancy of the defendant under said agreement commenced on the 15th of March, A. D. 1851; if the defendant continued to occupy said premises under said agreement to the time of bringing this suit, then the plaintiff can only recover in this action for so much of the rent sued for as accrued prior to the 15th day of March, A. D. 1856, unless the plaintiff has shown in evidence that the defendant agreed to pay the rent for said premises monthly. 4. If the letting of the premises in question was under a verbal or unwritten agreement and if there was no agreement between the parties that the rent was to be paid monthly, then the plaintiff can not recover in this action for any rent that has accrued since the 15th day of March, A. D. 1856." These instructions the court refused to give.

The court found for the plaintiff and assessed his damage at \$714.

Krum & Harding, for appellant.

I. The court erred in admitting in evidence the bill for \$583.36 for ten months' rent, as well as the verdict of the jury, which appear in the record of the former suit.

I. The evidence offered by the defendant should have been admitted.

III. The court erred in giving the instruction asked by plaintiff, also in refusing those asked by defendant. (5 Cush. 99.)

Knox & Kellogg, for respondent.

I. The appellant is estopped by the former judgment from setting up the agreement set up in his answer to this suit. The verdict in the former suit shows conclusively that the rent was \$700 per annum.

Ridgley v. Stillwell.

II. A renting of a house by the year, with nothing further said as to when or how the rent is payable, does not make the rent payable annually. There is evidence that the rent was payable monthly.

RICHARDSON, Judge, delivered the opinion of the court.

The law forbids the litigation of any matter which has once been determined by a court of competent authority between the same parties ; and a judgment therefore directly on a particular point is conclusive between the same parties in relation to the same matter involved in another suit. (Edgell v. Sigerson, 26 Mo. 583 ; Gardner v. Buckler, 3 Cow. 120 ; 2 Cow. & Hill's notes, 587, *et seq.*) But the rule only applies to that which was directly in issue. (1 Greenl. Ev. § 528,) and does not extend to points which were collaterally or incidentally considered, or that could only be argumentatively inferred from the judgment. (Hopkins v. Lee, 6 Wheat. 109.)

The application of these rules will show, we think, that the record of the former suit was improperly received in evidence. The main question in this case was whether the defendant had agreed to pay in monthly instalments \$700 per annum besides the taxes ; and, if this point was directly in issue and decided in the first suit, the controversy ought to cease. But it will be observed that the third count in the record offered in evidence proceeded entirely upon a *quantum meruit* for rent at the rate of \$800 per year for the first three years ending the 15th of March, 1854, and at the rate of \$1,000 a year after that time ; and the second count was upon a liability for \$700 a year, payable monthly, besides the taxes, for three years ending March 15, 1854, and \$800 per annum in monthly instalments, besides the taxes, after that time. To which count was the verdict responsive ? It found that the plaintiff was entitled to receive \$991.63, being the balance "for rent at the rate of \$700 per year ;" but neither count in the petition claimed only \$700 a year, for the second count claimed for the last two years \$800, and

Ridgley v. Stillwell.

the third count claimed \$800 for the first three years and \$1,000 for the last two. Then, again, the defendant insisted that he agreed to pay annually as rent a sum to be ascertained by calculating a given per centum on the cost of the lot and building; and, looking only at the pleadings, the verdict is not inconsistent with the defendant's theory except in the amount produced; for, though the defendant averred that the amount would not exceed \$600 per annum, it would of course be increased by a higher valuation of the cost of the lot and improvements.

Furthermore, the contract was an entirety, to-wit, the taxes and seven hundred dollars to be paid monthly. Now the jury did not find that the rent was payable monthly or that the defendant was to pay the taxes; and, conceding that the judgment in the first suit ascertained the yearly rent to be paid, it left open every other question, and was not competent to establish a fragment of the contract declared on in this case.

The plaintiff gave in evidence a receipt and an account rendered, which the defendant had used in a former suit, no doubt for the purpose of preventing the plaintiff from recovering more than seven hundred dollars per annum. These papers were not only relevant, but, having been recognized by the defendant as genuine and truthful, proved, not only that the rent was \$700 per year, but that it was payable at other periods than at the end of the year. The receipt was dated in January, 1852, and was at the foot of an account stating an indebtedness of the defendant to the plaintiff, which contained among other items this one: "To ten months' rent, ending 15th inst., \$583.33." The tenth part of this sum (one month's rent) multiplied by twelve produces seven hundred; and, as the year did not end until the middle of March following, the payment in January tends to show that the rent was not payable only at the expiration of the year. The bill rendered contains an item of \$1,283.35 for twenty-two months' rent, which goes to prove the same fact.

Squires v. Fithian's Adm'r.

The instruction asked by defendant ought to have been given. Rent is in its nature a return issuing yearly for the use of another's land, and, in the absence of any agreement or understanding between the parties to the contrary, is by law payable at the end of the year. (Menaugh's Appeal, 5 Watts & Serg. 432; Boyd v. McComb, 4 Penn. 146; Bordman v. Osborn, 23 Pick. 299.)

The other judges concurring, the judgment will be reversed and the cause remanded.

SQUIRES, Plaintiff in Error, v. FITHIAN'S ADMINISTRATOR *et al.*, Defendants in Error.

1. The local mechanics' lien act of St. Louis county of February 24, 1843, (Sess. Acts, 1843, p. 83,) did not confer a lien where the person for whom the building is erected has no interest in the premises but is a mere tenant at will.
2. The thirty days' notice referred to in said act is required only of sub-contractors.
3. Where the contract for the building of a house is really incomplete, the work being prosecuted from time to time as materials may be provided or as the progress of other work may require, the mechanic is not required to file his lien within six months of the completion of each detached piece of work, but within six months of the completion of the whole work.

Error to St. Louis Land Court.

This was an action commenced by *scire facias* to enforce a mechanic's lien upon a house and lot. The writ set forth that work was done by plaintiff and materials furnished by him under a contract with Samuel B. Fithian, the owner of the building; that Euphrosine Leitensdorfer and Josephine Colburn were owners of the lot; that the lien was filed February 3, 1855, within six months after the account accrued; that notice was given to said owners of the lot January 25, 1855, &c. The writ issued February 13, 1855.

The writ was served on Madame Leitensdorfer and Josephine Colburn. The latter answered disclaiming all interest

Squires v. Fithian's Adm'r.

in the lot. Fithian dying, his administrator was made a party to the suit. Madame Leitensdorfer answered alleging that she knew nothing of the state of accounts between plaintiff and Fithian; that plaintiff was neither contractor nor sub-contractor for her; that the building, so far forth as the plaintiff has done any work or furnished any materials therefor, was completed more than twelve months before the filing of any papers for a lien, or the giving of any notice; that no account was filed by plaintiff, Squires, nor any demand made for a lien, until after six months from the accrual of such demand against Fithian; that no demand ever accrued in favor of Squires against her; that Fithian, for ten months next preceding the institution of this suit or any proceeding in this cause, had no interest in the building or the land on which it stands; that Fithian never was any thing more than a *ténant at will* under defendant; that said tenancy had been determined more than twelve months before the putting in of the answer, and upwards of six months before the filing of any paper or the commencement of any proceedings in this cause.

The plaintiff introduced evidence showing and tending to show that the plaintiff, Squires, did the carpentry work of a brick house under a contract with Fithian, the son-in-law of Madame Leitensdorfer; that some work was done by plaintiff as late as October, 1854. Plaintiff also introduced evidence with a view to show that Madame Leitensdorfer sanctioned the work done by him, and that Fithian was her contractor and plaintiff Squires a sub-contractor.

Plaintiff asked the following instructions, which the court refused to give: "1. If the jury believe from the evidence that S. B. Fithian was in possession of the lot described in the *scire facias* by and with the consent of the said Euphrosine Leitensdorfer, his mother-in-law, who was the owner of said lot, and that said Fithian contracted with the plaintiff to furnish the materials and do the carpenter's work of said building, the jury will find for the plaintiff for the value of said work and materials, if the jury also believe from the

testimony that the plaintiff filed his lien within six months after he had completed his work. 3. If the jury believe from the evidence that the work done and materials furnished by the plaintiff in the month of October, 1854, as described by the witnesses, necessary to the completion of said work and building, then the jury will find that said lien was filed within the six months after the doing of the work and furnishing the materials. 3. If the said Euphrosine Leitensdorfer gave possession of said lot to said Fithian and he was the son-in-law of said Euphrosine, and she resided in the immediate vicinity of said lot and could see the daily progress of the work by the plaintiff and interposed no objection to the same, she is estopped, as far as plaintiff is concerned, to deny the right of said Fithian to erect said building and to contract for said work."

Defendant then asked the following instructions, which were given by the court: "4. If the plaintiff upwards of twelve months after doing any work on the building in question repaired thither with McKown and Ligget, and, for the mere purpose of making claim that he completed the work on that occasion, nailed the nosing on the portico which has been spoken of by the witnesses of the plaintiff, then he has no lien and can not recover in this action for any work done previously. 5. The plaintiff can not recover as against the defendant Leitensdorfer unless he shall have shown that within thirty days of the doing of the work for which the lien is claimed he gave notice to her of his intention to hold the premises for the amount of his demand. 6. The plaintiff can not have a lien for any work or materials which he shall not have shown to have been done and furnished towards the building described in the writ within the six months prior to the filing of the lien."

The plaintiff asked the court to give the following instruction: "7. If the jury believe from the evidence the plaintiff contracted with the defendant Fithian to do the carpenter's work and furnish the materials for the same upon the building mentioned in the *scire facias*, then until the

Squires v. Fithian's Adm'r.

completion of the work or the dissolution of the contract the plaintiff's account runs and he has six months thereafter to file his lien ; but the mere doing some little job of work, for the purpose of procuring a lien, after the work has been done or the contract dissolved, will not continue the lien." The court refused to give this instruction, as asked, but gave the same with the following modification: " Provided they also find that the work done and materials furnished were so done and furnished with the express consent of the other defendants who were the owners of the property, and such express consent must be proved." Both parties excepted.

The plaintiff thereupon took a nonsuit.

Whittelsey, Primm and Romyn, for plaintiff in error.

I. A tenant in possession of land is, under the act of 1843, to be considered as the owner of the building, and both it and the land will be bound by the lien unless the lease be recorded before the indebtedness accrued. (2 Rawle, 343; 4 W. & S. 223; *Bicel v. James*, 7 Watts, 9; *Holdship v. Abercrombie*, 7 Watts, 52.) Madame Leitensdorfer permitting the building without objection, must be estopped from denying the authority of Fithian. (*Skinner v. Stone*, 4 Mo. 93; 2 Smith Lea. Cas. 532; 3 Hill, 219; *Stephens v. Baird*, 9 Cow. 377; 21 Mo. 213.) The court therefore erred in refusing the first and third instructions asked by plaintiff.

II. The plaintiff has six months after the completion of his work or contract to file his lien. He is not limited to six months from the date of each separate item. (15 Mo. 280; 10 Barr, 413; 2 Jones, Penn. S. 339; 19 Penn. 341; 22 Penn. 489.) Account accrues from date of last item. (16 Mo. 256; 12 Penn. 339.) The plaintiff was not bound to prove the express assent of the owner of the property to the completion of plaintiff's work. The proviso to the seventh instruction is erroneous. (10 Barr, 413; *Johns v. Bolton*, 2 Jones, Penn. 339; 19 Penn. 341; 22 Penn. 489.)

III. The court erred in giving the fifth instruction. The third section of the act of 1843 applies only to cases of sub-

Squires v. Fithian's Adm'r.

contractors, and not to persons having contracts with the owner of the building. The plaintiff contracted with Fithian as owner of the building, and the limitation of thirty days' notice does not apply. (Schulenburg v. Gibson, 15 Mo. 280.)

Gantt, for defendants in error.

I. The court committed no error in refusing the seventh instruction as it originally stood. It was erroneous then; the addition did not mend it; but plaintiff excepted only to the refusal to give it in its original form. The other instructions asked by plaintiff were properly refused.

II. The fifth instruction did not damage the plaintiff. He could not recover against Madame Leitensdorfer in this form of action under any circumstances. (Clark v. Brown, 25 Mo. 564.)

III. The writ of *scire facias* is essentially defective. It shows that Fithian is not the owner of the lot on which the building stands, but that Madame Leitensdorfer is. It fails to show that Fithian had at any time any interest in the lot, or what that interest was, when it commenced, whether it is still subsisting or when it closed. It is ambiguous as to whether Fithian was contractor with Madame Leitensdorfer and Squires sub-contractor under him, or whether he (Fithian) claimed some interest in the lot by reason of which he improved it. (See 2 Wharton, 197.)

NAPTON, Judge, delivered the opinion of the court.

This action seems to be brought upon the hypothesis that the law in this state gives a lien against the owner of a lot where the contract for building is not made with him but with a person who has no interest in the premises. The local law of St. Louis provides for the case of a lease, but there was no lease proved in this suit—nothing at best but a tenancy at will. The act of 1843 provides only for leases which may be recorded, and of course alludes to such interest as must be, under the statute of frauds, in writing. (Sess. Acts, 1843, p. 83.) It was not thought necessary, it

may be supposed, to provide for interests short of this, as it was not contemplated that a person having a less interest in the premises than an estate for years would be willing to put up improvements on them. Our lien laws have not, like the Pennsylvania acts, adopted the principle of making land liable to a lien for improvements made thereon without regard to the right or title of the person ordering them.

The second instruction given by the court at the instance of the defendant was erroneous. The thirty days' notice referred to in the act of 1843 is confined to sub-contractors, and the petition does not proceed upon the hypothesis that the plaintiff was a sub-contractor under Fithian; nor does the evidence tend to establish such a state of facts.

The instructions given by the court in relation to the point of time from which the six months' limitation commences to run are somewhat confused as they appear on the record. Undoubtedly, after the actual completion of the work contracted for, the builder can not by a mere artifice, such as driving in a few nails, save himself from the operation of the limitation. Of this the jury, in each case, must judge according to the proof. But where the contract is really incomplete, where the work is prosecuted from time to time as materials may be provided or as the progress of other work may require, the mechanic is not required to file his lien within six months of the termination of each detached piece of work, but within six months of the completion of the whole work.

The evidence in this case tended to show that the lien was filed in time; but we can perceive no benefit to be derived by the plaintiff from a reversal of the judgment on this ground, since upon the main theory of his case he can not maintain his action. That Madame Leitensdorfer was bound in equity and good conscience to pay for this work, we think the evidence tends very satisfactorily to show; but that is not the question here. The only question is whether the plaintiff's remedy is given by the mechanics' lien law, and we do not see how he can get along under this statute. Whether

Barbee v. Wimer.

Madame Leitensdorfer's conduct, in witnessing and approving the progress of this work, thus conducted under a contract nominally with her son-in-law, who she knew had received from her no evidence of title, would justify an inference that she was really the principal in the contract and Dr. Fithian but acting as her agent, we are not now called upon to determine.

The other judges concurring, the judgment is affirmed.



BARBEE AND WIFE, Respondents, v. WIMER *et al.*, Appellants.

1. Debts contracted by a husband after property has come into the possession of his wife by descent, &c., may be enforced against that property. It is not exempted from execution by the act of March 5, 1849. (Sess. Acts, 1849, p. 67.)

Appeal from St. Louis Court of Common Pleas.

This was an action in behalf of Elvira Barbee to recover damages for an alleged unlawful seizure by defendant Wimer, as sheriff of St. Louis county, by the order and direction of the other defendants, of a negro slave alleged to be the sole and separate property of said Elvira Barbee. It was alleged in the petition that on the 16th day of August, 1851, William Triplet, the father of the said Elvira, gave to her the slave in question as her separate property free from the control of her husband, not subject to or liable for any debts, claims or demands contracted or to be contracted by the said husband, Andrew B. Barbee.

The defendants set up that said slave was levied on and sold by John M. Wimer, as sheriff, on the 11th of January, 1853, by virtue of two several executions—one issued under a judgment, dated September 23, 1852, against Andrew B. Barbee and Marshall Ring, founded on a promissory note executed by said Barbee and Ring—the other, issued under a judgment dated February 13, 1852, against said Barbee,

Barbee v. Wimer.

founded on a promissory note dated January 15th, 1852, for \$89.65. Defendants also allege that the proceeds of the sale of said negro slave—\$500—were applied in payment of said two executions; that the remainder was applied in payment of a third execution against said Barbee issued January 7, 1853; also that the deed of gift mentioned in the petition was fraudulent and void.

On the trial evidence was introduced showing and tending to show that the plaintiff Elvira Barbee was married to Andrew B. Barbee January 22, 1845; that by deed of gift dated August 16, 1851, William Triplett, father of said Elvira, gave the slave in controversy to her and her children "free from the control of her husband and not subject to or liable for any debts, dues, claims or demands contracted or to be hereafter contracted by him, the said Andrew B. Barbee, but to be held and enjoyed as the sole and exclusive property of her, the said Elvira;" that soon after the marriage of said Barbee said slave went to live with himself and wife, and remained with them, with slight intermissions, until levied on and sold as stated in the answer; that said Elvira always claimed the slave in controversy as her own. The evidence tended to show that previous to the execution of the deed of gift the slave was held by Barbee by way of a loan from Triplett.

The court, of its own motion, gave the following instructions to the jury: "1. If the jury believe from the evidence that the instrument of writing purporting to have been executed by Wm. Triplett, and read in evidence, was executed by him and delivered to Mrs. Barbee or her husband before the alleged seizure of the slave conveyed by said instrument, and that the possession of said slave was delivered to and retained by Mrs. Barbee or her husband under said instrument, and that the defendant Wimer seized and carried away said slave, then the plaintiffs are entitled to recover against said Wimer, unless it is further shown by the evidence that for five years prior to said instrument said slave had been in the continuous adverse possession of said Andrew or his wife,

Barbee v. Wimer.

or that prior to the execution and delivery of said instrument said Triplett had given said slave to Mrs. Barbee or her husband; and if said Wimer so seized and carried away as aforesaid said slave by the direction of Henderson, one of the defendants, then Henderson is equally liable with Wimer; otherwise, Henderson is not liable. 2. The measure of damages in this case, if the jury find for the plaintiffs, is the value of the slave, and the jury may allow interest at the rate of six per cent. per year from the time the slave was so taken from the plaintiffs. If Triplett, before the execution of the instrument in writing read in evidence, had given the said slave to said Andrew or his wife, and subsequent to said gift said slave was seized and taken away by virtue of or under an execution against said Andrew for a debt by him contracted subsequent to said gift, then the jury will find for the defendants; or if, prior to the execution and delivery of said instrument, said Andrew had had five years continuous adverse possession of said slave, and the same was seized and taken away by defendants under or by virtue of a judgment and execution against said Andrew, the jury should find for the defendants. 3. If the said slave was given to Mrs. Barbee unconditionally prior to the execution and delivery of the instrument in writing dated August 16th, 1851, and she or her husband had possession under such an absolute gift before the execution and delivery of said instrument, then said slave could not be seized under an execution against said Andrew issued upon a judgment recovered against said Andrew upon a debt contracted prior to said absolute gift, but it was liable to be seized upon execution under a judgment recovered upon a debt contracted after such an absolute gift, and the possession of the property by the donee. 4. If the slave in question was loaned by Triplett to said Andrew or his wife, and possession of said slave remained with said Andrew or his wife for the space of five years, then, as between said Triplett and said Andrew and wife the title to said property was still in said Triplett; and at any time thereafter and before the sale of the slave by said Andrew and

Barbee v. Wimer.

wife, or before the issuing of an execution against said Andrew or his wife, the said Triplett could make a valid disposition of the slave and convey the same."

The court refused various instructions asked by defendants. The jury found for plaintiffs.

Cline & Jamison, for appellants.

I. The deed of gift gave to Elvira Barbee a life interest with remainder to her children. The second instruction was therefore wrong and the damages excessive. (24 Mo. 182.) The court erred in giving the first instruction. The deed of gift was fraudulent as to the creditors of Barbee. It was not recorded. The slave was in his possession from the spring of 1845 to January, 1853. There was no change of possession when the said deed was made. Credit was given to him on account of his possession of said slave. (2 McCord Ch. 131; 1 Bay, 232; 2 Nott & McCord, 93.)

Carroll, for respondents, cited *Murray v. Fox*, 11 Mo. 555; *Cook v. Clippard*, 12 Mo. 379.

SCOTT, Judge, delivered the opinion of the court.

This case will be considered in two points of view; in the one, as it stands affected by the act of March 5th, 1849, entitled "An act to amend an 'Act to regulate executions;'" in the other, as it remains independent of the provisions of that act.

In viewing this controversy as influenced by the act of 1849, to which reference has been made, we find that only one of the debts, for the satisfaction of which the property in controversy was sold, accrued before the date of the bill of sale or deed of gift, which was the 16th of August, 1851. There is nothing in the act of 1849 which prevents the property belonging to married women before, or coming to them during, the marriage from being taken in satisfaction of debts contracted by the husband after the property has come into the wife's possession. The statute only exempts the property coming in right of the wife from the payment of the

debts before the marriage in case of property coming by and at the time of marriage, but property coming in right of the wife after marriage is only exempt from debts contracted previous to the time at which it comes into her possession ; or, which is the same thing, into the possession of the husband. Debts contracted after the property has come to the possession of the wife are not within the purview of the statute, and may be enforced against that property. Then, if the plaintiff claims under the deed of gift, as at least one of the debts on which the executions were founded was contracted after the property came into the possession of the wife by virtue of that instrument, it was lawfully sold.

If we regard the slave as a gift by the father to his daughter, from the time she left his house in October or November, 1845, accompanied by the slave, then it is obvious that the act of 1849 had nothing to do with the transaction, as the gift was perfected before that statute was enacted, and all the debts would have been contracted after the property of the wife had come to her possession. If the original dealing in relation to the slave in 1845 be regarded as a loan, as it should be if the parties to it so desire and are willing, then it would continue so until the date of the deed of gift in August, 1851 ; and in such event it has been shown how the transaction would be affected in reference to the act of 1849.

But, laying out of consideration the act of 1849, it may be said that if the original delivery of the slave was a loan and so intended, it continued such until the date of the deed of gift, and, although the slave had remained more than five years in the possession of the loanee, yet, as at the time of the gift no creditor or purchaser had acquired any right to or interest in the slave by suing out an execution or otherwise, the original loan then terminated, and, the transaction ceasing to be within the fifth section of the act concerning fraudulent conveyances (R. C. 1845, p. —), a creditor would afterwards have no right to seize the property under execution, as the loan had ceased before his execution became a lien on it, which from that time became the sole and exclu-

Barbee v. Wimer.

sive property of the wife by virtue of the bill of sale or deed of gift. In the case of *Meaux v. Caldwell*, 2 Bibb, 244, slaves were put in possession of a son-in-law, with whom they remained ten or eleven years, when they were taken out of his possession and other slaves were put in their place. The creditors of the son-in-law, whose debts were contracted whilst the first mentioned slaves were in his possession, seized them under execution, and, on a bill filed to enjoin the sale, the slaves were held subject to the execution. It was said that the lender of the slaves having acquired possession of them before the execution was levied, did not change the nature of the transaction; that five years' possession gave an absolute right so far as creditors and purchasers were concerned. So in the case of *Pate v. Baker*, 8 Leigh, 80, it was held that, after a loan to a person with whom or with those claiming under him possession had remained five years, a deed was made by the lender declaring the original loan and continuing it, but the deed was never admitted to record, it was held that the deed could not affect a creditor of the person in possession and ought not to be received as evidence against such creditor. (*Gay v. Mosely*, 2 Munf. 543.)

The case does not require that we should express an opinion on the questions-whether if the bill of sale had been recorded, and the debts afterwards contracted, the property would have been subject to them; or, whether, when the possession has remained with the loanee, or with those claiming under him, for five years, and is then resumed by the lender, the possession must continue with the lender the period of five years from the time it was resumed before the title will be revested in the lender as against a creditor of the loanee.

Napton, Judge, concurring, the judgment is reversed and the cause remanded. Judge Richardson did not sit, having been of counsel.

Magwire v. Hall's Adm'r.

MAGWIRE, Plaintiff in Error, v. HALL'S ADMINISTRATOR, Defendant in Error.

1. A. purchased certain leasehold premises with a saw-mill thereon, which were subject at the time of his purchase to a deed of trust made to secure certain promissory notes. A., at the time of his purchase, had notice of the existence of this deed and supposed it to be a valid encumbrance upon the property. In point of fact the notes and deed of trust were procured by fraud. After A.'s purchase the trustee under the deed of trust advertised the premises for sale and proceeded to sell the same, and at the sale the premises were struck off to one K. as the highest bidder. K. acted as the agent of A. and made the purchase for his benefit. Both A. and K. acted in ignorance of the fraud in procuring the notes and deed of trust. The trustee refused to execute a deed to K. and re-advertised the premises for sale under the deed of trust. K., acting for the benefit of A. and with a bond of indemnity from him, procured a temporary injunction enjoining the sale, A. becoming his surety on his injunction bond. This injunction was afterwards dissolved. In the meantime the saw-mill had burned down during the pendency of the injunction proceedings and previous to the dissolution of the injunction. The damages awarded to the defendants on the dissolution of the injunction were the full amount of the notes, with interest, &c.; which were paid by A. to the person who had originally procured by fraud the execution of the notes and deed of trust. Until after the termination of the injunction proceedings A. supposed that the deed of trust was a valid encumbrance. *Held*, that A., not being the party defrauded, was not entitled to recover back the amount so paid by him.

Error to St. Louis Court of Common Pleas.

Demurrer to a petition. John Magwire is plaintiff and William S. Allen, administrator of Elisha Hall, deceased, defendant. The facts as they appear in the petition are substantially as follows: Elisha Hall died in the year 1854, testate. The executors named in his will failed to qualify and the defendant Allen became administrator of his estate. On the 1st of June, 1845, one William Chambers, by lease in writing, let certain real estate in block 288 in North St. Louis to Judson Allen, Elisha Hall and Joshua J. Childs for the term of ten years. Said Hall, Allen and Childs were co-partners in the business of sawing lumber, and in the prosecution of said business they erected upon said leasehold

Magwire v. Hall's Adm'r.

premises a steam saw-mill and other improvements. Afterwards and before May 15, 1846, said Elisha Hall, representing that a larger capital was needed for the more successful prosecution of their business, induced his said co-partners to join with him in the execution of two notes, dated April 1, 1846, for \$1,030 each, bearing interest from date, payable to the order of Orris Hall (a brother of Elisha Hall), one in twelve months, the other in eighteen months from date, and, to secure the payment of said notes, to execute with him a deed of trust upon said leasehold premises. Said deed of trust is dated May 15th, 1846, and was made to one John R. Hammond as trustee, with power of sale in case of default of payment. After the execution of said notes and deed of trust, they were delivered to said Elisha Hall, upon his representation that upon them he could obtain the requisite means from his brother, the said Orris Hall. The only purpose for which said Allen and Childs consented to and joined in the execution of said notes and deed of trust was to raise money to increase their capital and to facilitate the business of said firm. Elisha Hall, having obtained possession of the notes and deed of trust, represented and pretended to his partners that he had procured the discount of said notes by said Orris Hall; but, in violation of his agreement, refused to pay over or apply to the use of the partnership the money so obtained, alleging and pretending that he held said money in his own hands to secure himself against loss by reason of alleged advances made by him to said co-partnership and by reason of debts due by said co-partnership to others. Said pretences and representations of said Elisha Hall were wholly false; he did not negotiate or obtain money upon said notes or either of them, but held the same in his own possession and control up to the time of his death. On the 13th of February, 1847, said Elisha Hall sold and conveyed his interest in said leasehold premises to one Primus Emerson and said Joshua J. Childs, and required them to enter into bond to him, with plaintiff Magwire as security, conditioned for the protection and indemnification of said Elisha Hall against the debts of said co-partnership;

Magwire v. Hall's Adm'r.

which debts were afterwards all fully paid and discharged. About February 18, 1848, plaintiff Magwire purchased and became entitled to said leasehold premises and all the interest of said Hall, Allen, Childs and Emerson therein. After said sale from said E. Hall to said Primus Emerson, to-wit, in May or June, 1847, he, said Hall, still holding said notes and deed of trust, pretending to be acting as the agent of said Orris Hall, but really seeking and designing to enforce the collection of said notes for his own use and benefit, and in fraud of the rights of his co-partners and of said Emerson, induced said John R. Hammond, said trustee, to advertise said leasehold premises for sale under said deed. Said Hammond accordingly did proceed to sell said premises on or about June 7, 1847, to one James Kennedy, who was the highest bidder. Kennedy purchased for plaintiff's benefit, who advanced the purchase money to him. He immediately conveyed all his right, title and interest to plaintiff Magwire. At the time of this sale and purchase neither Kennedy nor plaintiff Magwire knew the facts above stated relating to said notes and deed of trust, but supposed that said notes and deed of trust were valid and constituted a valid lien on said leasehold property. After said trustee's sale said trustee refused to execute a deed to said Kennedy, but re-advertised said property for sale. Said Kennedy, acting for plaintiff and under a bond of indemnity from him, filed his bill in chancery in the St. Louis circuit court, praying for an injunction against said Hammond and Orris Hall restraining said second sale. The court issued its temporary injunction so restraining said Hammond and Hall, their agents and servants. In order to obtain said injunction said Kennedy was obliged to and did execute a bond, with plaintiff as security, in the sum of \$——, in favor of the defendants in said cause, conditioned that the said Kennedy should abide the decision of said circuit court, and pay all sums of money, damages and costs that should be adjudged against him if the injunction should be dissolved. Said injunction was dissolved. Before the dissolution thereof, and during the pendency of

Magwire v. Hall's Adm'r.

said cause, said saw-mill burned down; and in consequence thereof the damages sustained by the defendants in said cause were assessed at the whole amount of said notes, interest and costs of suit. Afterwards, on or about November 11, 1854, the plaintiff Magwire, by reason of his bond of indemnity to Kennedy and his having joined in said injunction bond, was obliged to satisfy and discharge the amount of damages with interest and costs, to-wit, the sum of \$3,846. Said Elisha Hall procured said notes and said deed of trust by a fraud upon his co-partners. At the time of said sale under said deed of trust, said Elisha Hall held said notes and deed of trust for his own benefit. In his hands they were null and void. Said Hall fraudulently procured said sale for his own benefit. Said Hall procured said injunction suit to be defended and procured said assessment of damages for his own benefit, and neither said Hammond nor said Orris Hall had any real interest therein. The amount of said damages was paid by plaintiff since the death of said Elisha Hall to the defendant as administrator of the estate of said Elisha. It is now in his hands as part of the assets of said estate. Plaintiff did not know until after the determination of said cause in chancery and until after the payment of said money that said notes had never been negotiated or discounted, but always supposed that they had been so discounted as aforesaid, and that said sale under the deed of trust was made to repay the advances made upon them, and that it was a valid sale. "Plaintiff therefore says that he has a demand against defendant, as for so much money had and received to plaintiff's use, in the sum of \$3,846.16, and for that sum, with interest and costs, prays judgment," &c.

To this petition the defendant demurred and the court sustained the demurrer.

W. T. Wood and Krum & Harding, for defendants in error.

I. At the time Hall sold out to Emerson and Childs, the notes and deed of trust were null and void. As between Hall

Magwire v. Hall's Adm'r.

and the new firm they had no validity. Nothing in the subsequent acts of the parties interested gave them vitality or validity in law. (See generally 1 Sto. Eq. § 188, 191-2; Mitchell v. Atlinger, 1 Barr, 219; Jackson v. Sommerville, 13 Penn. 368-9.) No lapse of time nor any act of confirmation by the party defrauded, even with full knowledge of the facts, can restore and make vital a contract dead on account of actual fraud. (13 Penn. 370; Duncan v. McCullough, 4 S. & R. 485; Chamberlain v. McClung, 3 W. & S. 36; Co. Litt. 2146.) If the party defrauded can not affirm and give validity to a transaction void for actual fraud, who else could? At the commencement of the injunction proceedings and the dissolution of the injunction, the notes and deed of trust were null and void. (See 10 Penn. 185; Mitchell v. Kintzin, 5 Penn. 216; Reigal v. Wood, 1 John. Ch. 402; United States, 15 Pet. 594.) The judgment in the injunction proceedings may be impeached collaterally. The judgment was based on instruments procured by fraud and kept on foot for fraudulent purposes; but Magwire and Kennedy knew nothing of the fraud until after the judgment and the payment of the money. (See 13 Penn. 361; 9 Mo. 783; 11 How. 437; 1 Johns. Ch. 402; Edgell v. Sigerson, 20 Mo. 494.) If Magwire had had knowledge of the fraud and had been a party to the proceeding, he might have set up the fraud to prevent a judgment based on the notes and deed of trust. He may now recover the money coerced from him under a judgment void for fraud.

II. No demand was necessary in the case. (Lent v. Padelford, 10 Mass. 244; 22 Mo. 405.)

III. Orris Hall was not a necessary party.

IV. The petition in this case is not a count for money had and received. It states a case in equity.

Hill, Grover & Hill, for defendants in error.

I. The action could not be maintained without a demand. (16 Mo. 527; 10 Johns. 284; 5 Cow. 378.)

II. The suit is against defendant as administrator, and as

Magwire v. Hall's Adm'r.

such he is not liable for money had and received to plaintiff's use. (2 Ala. 354 ; 19 Ala. 25 ; 5 Harring. 289 ; 3 id. 500.)

III. There was no privity between plaintiff and defendant, nor between plaintiff and defendant's testator. (12 Ill. 240.) There was no privity between plaintiff and Hall and Hammond, the defendants in the chancery suit. There was privity however between Magwire and Kennedy. Magwire is bound by the decree in that case. (4 Hill, 522 ; 1 Johns. 518 ; 6 Johns. 158 ; 3 T. R. 374 ; 4 Mass. 349.) The merits of a judgment can never be overhauled in an original suit either at law or equity. Until the judgment is set aside or reversed it is conclusive. (3 Johns. 157 ; 3 Day, 36 ; 3 T. R. 69 ; 12 Mass. 137, 269 ; 16 Mass. 308 ; 17 Mass. 394 ; 1 Pick. 485 ; 8 Johns. 470 ; 4 Bibb, 508 ; 2 A. K. Marsh. 353 ; 4 Verm. 616 ; 2 S. & R. 143 ; 1 John. C. 543 ; 16 Conn. 12 ; 6 Paige, 233 ; 1 Green. Ch. 108 ; 1 Bland, 486 ; 1 Blackf. 360 ; 1 Sch. & Lefr. 204 ; 1 Johns. Ch. 322.)

SCOTT, Judge, delivered the opinion of the court.

We can not conceive a ground in law or equity on which the plaintiff's right to a recovery in this action can be made to stand. The petition claims that the defendant holds to the use of the plaintiff money to which he is entitled. The cause of action, as stated, fails to set forth any facts from which this allegation can derive any support. The plaintiff, it appears, bought a leasehold estate encumbered with a trust given to secure the payment of debts. He admits that he was aware of the encumbrance at the time of this purchase and says he supposed the debts were genuine and really due, but afterwards discovered that they were fraudulent and pretended. Now, admitting that the debts were fraudulent, that was no concern of the plaintiff. He knew of their existence at the time of his purchase ; he believed them to be justly due ; he must therefore have been indemnified against them by the reduced price at which he purchased the property. As the debts were taken in the estimate in ascertain-

Bowman v. Pacific Insurance Co.

ing the value of the estate, whether they were real or pretended can not affect the plaintiff. To permit him to recover would be taking so much from those who are really defrauded and giving to the plaintiff who has no right to it. Those who conveyed the property to the plaintiffs are the only persons to take advantage of the fraud, and if they acquiesce in it nobody else has any ground for complaint.

This view of the subject disposes of the case, and we deem it unnecessary to advert to the other points made by counsel in their briefs.

The other judges concurring, the judgment is affirmed.

BOWMAN, Plaintiff in Error, v. PACIFIC INSURANCE COMPANY,
Defendant in Error.

1. Among the printed clauses of a fire policy on merchandise were the following: "If there shall be deposited, kept or stored therein any of the articles, goods or merchandise in the same terms and conditions denominated 'hazardous,' or 'extra hazardous,' or included in the memorandum of 'special' rates, except as herein specially provided for, or hereafter agreed to by this corporation in writing, to be added to or endorsed upon this policy, then and from thenceforth so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force and effect." "And it is conditioned that no greater amount than twenty-five pounds of gunpowder shall at any time be placed in the building described in this policy—said powder to be kept in tin or other metallic canisters." Among the articles enumerated in the memorandum of "special" rates was gunpowder. There were no other provisions with respect to the keeping of gunpowder. *Held*, that the assured might keep on hand a quantity of powder less than twenty-five pounds in tin or other metallic canisters.

Error to St. Louis Court of Common Pleas.

This was an action on a policy of insurance against fire. Said policy contained the following clauses: "If there shall be kept or stored therein any of the articles, goods or merchandise in the same terms and conditions denominated 'hazardous,' or 'extra hazardous,' or included in the memorandum of 'special' rates, except as herein specially provi-

Bowman v. Pacific Insurance Co.

ded for, or hereafter agreed to by this corporation in writing, to be added to or endorsed upon this policy, then and from thenceforth so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force and effect." "And it is conditioned that no greater amount than twenty-five pounds of gunpowder shall be placed at any time in the building described in this policy—said powder to be kept in tin or other metallic canisters." "Gunpowder" was included in the memorandum of "special" articles.

The evidence tended to show that the plaintiff kept from four to six pounds of powder in his store, and that it was kept in a wooden keg lined with tin foil.

The court instructed the jury as follows: "The terms of the policy suspended the risk whilst gunpowder was kept in the store, unless the defendant agreed in writing that the same might be kept; and, even if such an agreement in writing had been made, the risk would have been suspended by the terms of the policy if the gunpowder was not kept in tin or other metallic canisters, or if the quantity exceeded twenty-five pounds. If therefore there was any gunpowder in the building at the time of the fire and loss, then the jury must find for the defendant, as there is no evidence that the defendant ever agreed in writing that gunpowder might be deposited, stored or kept there."

The plaintiff thereupon took a nonsuit, with leave, &c.

Krum & Harding, for plaintiff in error.

I. The court erred in its construction of the policy. Although the clause concerning hazardous and special articles would exclude gunpowder unless agreed to by the company, the subsequent clause is an express agreement that the assured may keep gunpowder in a certain manner.

II. Whether a keg lined with tin foil is a "tin or metallic canister" is a question of fact for the jury.

Biddlecome, for defendant in error.

I. The policy absolutely prohibits the keeping of gunpow-

der in any quantity without the written consent of the company. The second provision mentioned is not an exception as a special provision for keeping gunpowder. It only takes effect when that consent has been properly obtained, and regulates the quantity and the manner of keeping it. The instruction given was correct.

NAPTON, Judge, delivered the opinion of the court.

The construction given to the policy sued on was, in our opinion, erroneous. The first clause of the policy referred to creates a forfeiture in the event that any of the articles enumerated in the memorandum of special rates is kept in the house insured, *except* where a special provision is made on the subject in the policy, or where such special provision is subsequently agreed to by the parties, reduced to writing and endorsed on the policy. A special provision in relation to gunpowder is found in the body of the policy, and that provision is totally inconsistent with the construction of the first clause which absolutely excludes it. Twenty-five pounds of gunpowder are allowed to be kept, provided it is kept in tin or metallic canisters.

To construe the first section as excluding gunpowder *in toto*, and the second as allowing it in certain quantities and secured in certain modes, produces a palpable contradiction in the body of the instrument, which is unnecessary. The two provisions will harmonize if the one be understood as modifying the other, and in doing this we must consider the special regulation as controlling the more general one, and not give a preponderating importance to the general provision, as the defendant's counsel insists, and to produce consistency interpolate a material qualification upon the special clause. The company insists that the privilege of keeping gunpowder, in kegs of twenty-five pounds or under, shall only be enjoyed when there is a special agreement for that purpose; or rather when there is a special agreement for keeping gunpowder at all. Such interpretation would seem

Matthews v. Wilson.

to be a strained one ; for, if a special agreement, in writing and endorsed on the policy, had to be made, in order that the insured might keep any gunpowder whatever, it would surely require no more trouble and hardly any more writing to put down the whole of such agreement at once and specify the amount beyond which the insured could not go and the manner in which the powder should be kept. This makes the special printed clause in the policy almost useless.

The other judges concurring, the judgment will be reversed and the cause remanded.

MATTHEWS, Plaintiff in Error, v. WILSON *et al.*, Defendants
in Error.

1. Where a principal seeks to recover specific sums of money alleged to have been received by his agent in the course of his employment, and misappropriated by him, it is not error to refuse to order an account, prayed for by the plaintiff, to be taken.

Error to St. Louis Land Court.

The object of this action is to charge the separate estate of Cornelia Wilson, wife of John D. Wilson, with the payment of certain specific sums of money alleged to have been fraudulently taken and applied by the said John D. Wilson in payment of debts due by the wife in respect of her separate property. The plaintiff prayed that said estate might be made subject to the repayment of said moneys by a sale under the order of the court ; that "all necessary and proper accounts may be taken under the order of the court."

The cause was tried by the court without a jury. The court found the facts as follows : 1. On or about the first of June, 1851, an arrangement was made between Matthews, the plaintiff, and John D. Wilson, the defendant, whereby Wilson was to manage and conduct a mercantile establishment at St. Louis, in the name of Matthews. Wilson did

Matthews v. Wilson.

conduct the establishment, apparently without any control on the part of Matthews, by buying goods and selling goods, receiving and paying money, depositing and checking out funds, all in the name of Matthews. But whether Wilson so acted in the premises as the mere agent of Matthews, as claimed in the petition, or as a partner of Matthews, as claimed in the answer of J. D. Wilson, the court does not determine, because the contract of agency, in the terms stated in the petition, is not proved; and the contract of partnership, in the terms stated in the answer of Wilson, is not proved. 2. Matthews did not personally transact or manage the business of the concern, and was absent from St. Louis a considerable portion of the time, in which Wilson carried on the business. But he had access to the books, and the means to know the state of the accounts of the concern; and at the expiration of the first year of the business, that is, on or about the 31st of May, 1852, Matthews and Wilson together settled the accounts of the business down to that time, and by that settlement and the balance then struck by the parties it appeared that Wilson was indebted to the concern \$1,584.46. This balance against Wilson was carried to his account on the books, with the knowledge of Matthews. The business continued to be conducted in the same manner until the 24th of January, 1853, or about that time, when Matthews refused to continue the business longer, and by mutual consent the connection was dissolved, and the accounts of the business settled by the parties. On that settlement it appeared that a loss had been incurred in the business, and that Wilson stood indebted to the concern in the sum of \$2,873.22. 3. All the capital of the concern belonged to Matthews. Wilson was insolvent before the beginning of the business and still continues so. 4. Cornelia V. Wilson, wife of defendant, John D., had the separate real estate vested in her trustee, Charles Gibson, as stated in the petition; and her husband, John D. Wilson, often acted as her agent in collecting and paying out money on account of said estate. But it does not appear that he was her general agent for the property, with power

Matthews v. Wilson.

to manage and control it. 5. While John D. Wilson was conducting the said mercantile business in connection with Matthews, and during the first year thereof, he made considerable payments on account of the purchase and improvements of said separate estate of his wife out of the funds under his control, in the name of Matthews; all of which sums were entered on the books of the concern, and were items of the account settled and balanced by the parties on the 31st of May, 1852. 6. After the 31st of May, 1852, the said John D. Wilson appropriated other considerable sums of money out of the funds under his control in the name of Matthews in payment of the purchase money and the improvement of his wife's separate estate; and during the same time he received, on account of his wife's separate estate, considerable sums of money, and deposited the same in the name of said Matthews, and to the credit of the bank account of the said concern; and the money so deposited exceeded in amount the money so paid out. 7. The said John D. Wilson, in withdrawing the money from the concern and paying it out on account of his wife's separate estate, was not guilty of fraud, as charged in the petition. 8. The defendant Cornelia is not proved to have had any knowledge or notice of any unfair practice (if any such there were) on the part of her husband against the plaintiff Matthews. In view of the record of the case and upon the facts found as above, the court is of opinion that the plaintiff has no right to charge upon the separate estate of the said Cornelia the moneys claimed by him in his petition; and therefore his petition ought to be dismissed."

Field, for plaintiff in error.

S. T. Glover, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

The error in the proceedings in this cause of which the plaintiff complains is that the court below did not direct an account between him and the defendant Wilson. The peti-

tion does not allege that there was a partnership between the plaintiffs and the defendant Wilson. Wilson, as the agent or superintendent of a mercantile house for the plaintiff in St. Louis, is charged with the misappropriation of specific sums of money received in the course of his employment, and the aggregate of these misapplications is stated, with a prayer that the property of Wilson's wife, to the improvement of which the money illegally taken from the plaintiff had been appropriated, may be sold to satisfy the indebtedness thus incurred. The specific sum for which relief is sought is set forth in the petition. Although an account is asked for, yet from the tenor of the statement of the cause of action it is obvious that the account sought was only ancillary to the main design of the suit, which was the recovery of the amount of the specific sums misapplied by Wilson. It is not alleged that Wilson withdrew any other sums than those specifically stated, and no account was prayed with respect to any other money. As the charge of misappropriation of money entrusted to him is met and denied by Wilson, and as the court below found the issues for him, we do not conceive that any useful purpose could have been subserved by directing an account, as, the issues being found for the defendants, it clearly appeared from the pleadings in the cause that there was no other ground of complaint against them. The petition as framed did not require a general account; it only sought the payment of specific sums of money which it was alleged had been misapplied by Wilson. If Wilson had been a partner of the plaintiff, such is the structure of the petition that no general account between them would have been necessary for the determination of the matters stated as the cause of the action.

Judge Napton concurring, the judgment is affirmed. Judge Richardson not sitting, having been of counsel.

WOOD *et al.*, Respondents, v. STEAMBOAT FLEETWOOD, Appellant.

1. The act concerning boats and vessels (R. C. 1845, p. 180) applies to boats and vessels owned in sister states as well as to those owned in Missouri. (Yore v. Steamboat C. Bealer, 26 Mo. 426, affirmed.)
2. Where the rate of freight inserted in a dray ticket is "30 cents per hundred" and the clerk of a steamboat signs the same by mistake or oversight, and the shipper of the goods at the time he puts the same on board for transportation has no knowledge of the mistake, and when it is discovered refuses to pay a higher rate of freight and demands his goods of the boat, and its officers fail to re-deliver the same, and transport them to their place of destination, they will not be entitled to demand in behalf of the boat more than 30 cents per hundred.

Appeal from St. Louis Court of Common Pleas.

This case has heretofore been twice before the supreme court. (See 19 Mo. 529; 22 Mo. 569.) On the last trial the court, among other instructions given and refused, gave the following at the instance of the plaintiffs: "1. If the jury believe from the evidence that the rate of freight was inserted in a dray ticket, and said ticket was afterwards signed by the clerk by mistake or oversight and the freight taken on board, the plaintiffs having no knowledge of such mistake or oversight at the time such freight was taken on board of the boat, but on the discovery of said mistake plaintiffs demanded the freight to be put ashore before the boat left, and the defendant refused to put it ashore, and brought the same to the place of destination, the bringing of such freight under the circumstances was an acceptance on the part of defendant of the contract contained in said dray ticket. 2. If the jury believe from the evidence that the rate of freight was inserted in a dray ticket at thirty cents per hundred, and that said ticket was afterwards signed by the clerk of defendant through mistake or oversight and the malt taken on board of the defendant, the plaintiff having no knowledge or notice of such mistake or oversight at the time such malt was taken on board of the defendant, and that

Wood v. Steamboat Fleetwood.

plaintiff, when informed of such mistake or oversight and that more than thirty cents per hundred would be charged by defendant as freight money, refused to agree to pay more than thirty cents per hundred and demanded the re-delivery of the malt to them, and if the defendant refused or failed to re-deliver the same and brought it to the place of destination, then the bringing of the malt to St. Louis by the defendant, under the circumstances, was an assent or agreement by the defendant to transport the malt at the rate of thirty cents per hundred."

Knox & Kellogg, for appellants.

I. As the owners of the boat resided out of the state, the court had no jurisdiction. (1 Newb. Adm'y, 101, 296, 443; Conck, Adm'y, 32, 370, 450; 13 How. 101, 283; 12 How. 443, 466; 5 How. 441.)

II. The first and second instructions given by the court should have been refused. There was no evidence of any demand to put the freight ashore. The verdict was against the evidence and the instructions.

R. T. & J. R. Barrett, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was brought under our statute concerning boats and vessels for the breach of a contract of affreightment made in Pittsburgh and to be performed in St. Louis, where the cause of action accrued. It was shown that at the date of the contract and from thence continuously to the time of the institution of the suit the owners of the defendant were non-residents of this state, and it is insisted that this fact of itself defeated the jurisdiction of our courts. The same question arose in the case of *Yore v. Steamboat C. Bealer*, decided at this term, in which it was held that boats navigating the waters of this state, no matter where the owners reside, are rightfully within the provisions of our law and stand in our courts on the footing of domestic vessels.

Kurlbaum v. Roepke.

There was evidence to warrant the first and second instructions asked by the plaintiff and given. The drayman testified that as agent of the plaintiff he delivered the malt to the boat, and that the disagreement in reference to the price did not occur until after the malt was on board and he had requested the clerk to sign a bill of lading. Under all the circumstances his relation to the transaction was such as to authorize him to speak on that occasion for the plaintiffs, and if the freight was taken under a mutual mistake the defendant should have re-delivered it or carried it at the price mentioned in the dray ticket.

The judgment will be affirmed, the other judges concurring.

KURLBAUM, Respondent, v. ROEPKE, Appellant.

1. The revised code of 1855 does not require a finding of the facts where a cause is tried by the court.
2. Where a cause is tried by the court without a jury and no instructions or declarations of law are asked or given, the supreme court will not interfere by ordering a new trial.

Appeal from St. Louis Law Commissioner's Court.

Goodlett, for appellant.

S. H. Gardner, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This suit was commenced after the code of 1855 was in force. The case was tried by the court, the parties having waived a jury. The present code does not require a finding of the facts when the issues in a cause are tried by the court. The old practice in such cases is now revived. When a cause is tried by the court sitting as a jury and no instructions or declarations of law are asked or given on the trial, this court will not interfere by ordering a new trial.

Judge Napton concurring, the judgment is affirmed.

McCLELLAN & HILLYER, Respondents, v. PARKER, Appellant.

1. Where an agent enters into a contract in his own name and does not disclose his principal he is personally liable.

Appeal from St. Louis Law Commissioner's Court.

This was an action to recover the value of services rendered by plaintiffs, as attorneys at law, in the examination of the title to certain real estate and in the drafting of a deed of trust. The evidence tended to show that defendant applied to one McKnight for a loan of money on real estate; that McKnight referred defendant to plaintiffs for an examination of the title to the said real estate; that plaintiffs made such an examination. Evidence was introduced by plaintiff, against the objection of defendant, tending to show a custom that borrowers, in such cases as the present, pay the expenses of examinations. There was evidence tending to show that Parker acted as the agent of other parties in negotiating the loan.

The court found for plaintiffs.

Glover and Gilmer, for appellant.

Moody, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This case did not require the proof of any custom; but evidence of such custom was merely irrelevant. It had no tendency to mislead or prejudice, and therefore the admission of it is no ground for reversal.

The defendant acted as agent for others. It does not appear that he disclosed the names of those for whom he was acting, or that the credit was given to any one but himself. Under such circumstances, though acting for others, he is personally liable. The principals, if they had been known to the plaintiffs before suit was brought, would have been

Smock v. White.—Menkens v. Watson.

subject to an action, but under the circumstances they were not bound to sue them.

As the defendant had the services performed he was liable for them. This was no case for the application of the custom even if it were a lawful one. Had the money lender employed the plaintiffs, and the suit been brought against the borrowers for their services, then the custom, if a valid one, would have applied to the case. The judgment is affirmed, Judge Napton concurring. Judge Richardson not sitting.

SMOCK *et al.*, Respondents, v. WHITE, Appellant.

1. It is the settled practice of the supreme court not to interfere with the verdicts of juries because they are against the weight of evidence.

Appeal from St. Louis Court of Common Pleas.

Hudson & Thomas, for appellant.

S. T. & A. D. Glover, for respondents.

NAPTON, Judge, delivered the opinion of the court.

No point of law is presented by this record. No instructions were asked or given. The jury passed upon the question of fact submitted and the court sanctioned the verdict of the jury. No objection was made to the testimony on either side. It is a settled practice of this court not to interfere in such cases. The judgment is affirmed. Richardson, Judge, not sitting, having been of counsel.

MENKENS, Appellant, v. WATSON, Respondent.

1. One who ratifies an act done in his name without previous authority ratifies it as done; he can not make such an agent responsible for not doing the ratified act in the manner he would have been bound to perform it if he had been an authorized agent.

Appeal from St. Louis Court of Common Pleas.

The petition in this case states that on the 23d of April, 1849, plaintiff entrusted to one Andrew Duhring, who was then on the point of departing to California, an amount of jewelry of the value of \$1,556.67; that on or about said date said Duhring started for California; that he died before reaching Sacramento city; that the jewelry was delivered to certain auctioneers in Sacramento city, who sold the same on account of whom it might concern; that on or about October 24, 1849, one Hastings was appointed administrator of the estate of said Duhring; that he gave bond, &c., and received the amount of said sales; that he made his final settlement, from which it appeared that \$1,193.80 was found due plaintiff, Menkens, the goods found in Duhring's possession having been delivered to him as plaintiff's agent; that on or about November 13, 1851, defendant, Watson, "representing himself to said administrator as having authority so to do, collected the said amount of \$1,193.80 so coming to plaintiff as above shown from said administrator, for which he gave a receipt in full for \$1,000;" that by reason of the premises defendant is justly indebted to plaintiff in the sum of \$1,193.80, with interest, &c.

The following is the finding of the facts by the court: "On the 23d of April, 1849, the plaintiff placed in the possession of Andrew Duhring, as plaintiff's agent, the jewelry and watches in the petition mentioned, to be taken by said Duhring to California and sold for the plaintiff on commission, valued at \$1,556.67. Whilst said Duhring was on his way to California he died and said jewelry and watches were taken by John Turner, who had been requested by the plaintiff to take charge of the same if any accident happened to said Duhring. Said jewelry and watches were, with the consent and under the direction of said Turner, sold at auction in Sacramento city, in the state of California, and the proceeds thereof were paid over by the auctioneers, on the order of said Turner, to S. C. Hastings, who was acting at the time

Menkens v. Watson.

as administrator of said Duhring. The said Hastings had in his possession, of said proceeds, \$1,193.80, which sum he loaned to Berryman Jennings, with the approbation of the judge of the court making the appointment of said administrator. Said Jennings became insolvent. The defendant, representing himself to be the agent of the plaintiff duly authorized to settle with said Hastings, gave the receipt offered in evidence, having settled with said Hastings by receiving from him a contract for lands, as specified in said receipt, the title to which land completely failed. The defendant never received from said Hastings any thing except said contract. No amount was found by said court due to the plaintiff on the final settlement of said administrator, nor did the defendant ever collect or receive from said Hastings for or on account of the plaintiff, or purporting to act as plaintiff's agent, any money whatever. As such agent for plaintiff the defendant did receive a contract for land as stated in said receipt and did sign said receipt, but never received possession of or a deed for said land, and the title for said land has entirely failed. Whereupon the court declares that the plaintiff is not entitled to recover, and gives judgment for the defendant." The receipt mentioned in the petition is not found in the record. The following receipt appears in the brief of the plaintiff's counsel: "Sacramento city, November 13, 1851. Received of S. C. Hastings \$1,000 by contract and sale of one-tenth of a certain tract of land described in a written contract of even date herewith, in full satisfaction of all demands against the said Hastings as administrator of Andrew Duhring, deceased, by the heirs, creditors or any person interested in said estate. R. J. Watson."

The court gave judgment for the defendant. Plaintiff filed his motion for review, which being overruled, he appealed.

Whittelsey, for appellant.

1. The defendant, acting as plaintiff's agent to collect what belonged to plaintiff, received the amount in land which he

had no authority to do, and the plaintiff has never ratified his acts. He could only collect in money. (10 B. & C. 760; 4 B. & Ald. 210, 395; 2 Y. & Coll. 414; 1 B. & Ad. 605; 11 Texas, 764; 33 Eng. L. & Eq. 321; Sto. on Ag. § 98, 181, 413, 99.) Having received payment in land for his own benefit, he is liable to his principal for the whole amount. (1 Am. Lea. Cas. 480; 3 Mass. 403; 6 Watts & Serg. 264.)

H. N. Hart, for respondent.

I. The facts found warrant the judgment.

SCOTT, Judge, delivered the opinion of the court.

The most important paper in this cause and one which is the foundation of the defendant's liability is neither to be found in the record nor is it set out in the finding of the court. It seems that the money of the plaintiff, which was due from the estate of Duhring, was lost by loaning it out to one who proved afterwards to be insolvent. It does not appear that the administrator Hastings was liable for this loss, as the law of California in relation to this subject was not given in evidence. The inference would seem to be that he was not liable, as it is stated that the loan was made with the approbation of the judge who made the appointment of the administrator. Now, if the plaintiff's debt was lost before the defendant interfered, a strong reason would be required to subject him to its payment—stronger than any found on the record. The motive of the defendant in giving the receipt and acting as agent for the plaintiff should have been shown. If the defendant had no authority to act in the matter, his conduct might have been disclaimed, and Hastings, if he was liable, might still have been compelled to pay the debt. The defendant not being a regularly constituted agent, but only becoming so by the adoption of his act, his act must be taken as it is, and it can not be made a ground for treating him as though he was a lawful agent. As the plaintiff seeks to subject the defendant to liability by reason of the

Andrews v. Lynch.

receipt, it should have been set out in the record. The principle that an agent can not receive any thing but money in payment of a money demand is a correct one, but its application under the circumstances of this case is not very apparent.

The judgment is affirmed ; the other judges concurring.

ANDREWS, Respondent, v. LYNCH, Appellant.

1. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take same by demurrer or answer.
2. A petition alleging that the plaintiff delivered a slave belonging to him to the defendant for safe keeping, he agreeing to pay defendant a certain sum per day ; that said slave had never been delivered by defendant to plaintiff, although plaintiff had demanded said slave from him, is defective ; it alleges no contract to re-deliver, no conversion of the slave by defendant, no loss through the negligence of defendant.

Appeal from St. Louis Circuit Court.

The petition in this case is as follows: "Plaintiff states that he was the owner of a slave named David, aged about twenty-three years, a slave for life and dark copper color ; that heretofore, to-wit, on the 31st day of October, 1854, the plaintiff delivered said slave to the defendant for safe keeping, and for which the plaintiff agreed to pay the defendant thirty cents per day, including the board of said slave ; that said slave has never been delivered by said defendant to the plaintiff, although the plaintiff in November, 1854, demanded said slave from the defendant and the defendant refused and neglected to comply with said demand ; and said defendant has ever since and does yet refuse and neglect to deliver said slave to the plaintiff ; that said slave was worth \$1,200 in cash, and his hire per month \$25, making in all the sum of \$1,500, in which sum the plaintiff says the defendant is indebted to him, and for which," &c.

Andrews v. Lynch.

The following are the only instructions given to the jury, given at the instance of the defendant: "1. If the defendant used in keeping the plaintiff's negro that amount of care which persons of ordinary prudence in their business ordinarily take of their own property, and, notwithstanding, the slave escaped, the defendant is not liable, and the burden is on the plaintiff to show that defendant did not use such care. 2. If the jury find from the evidence that the plaintiff's slave escaped from defendant's premises, he can not recover unless the escape was through the negligence of the defendant or his servants, and the burden of proof is on the plaintiff to show that said slave escaped by means of such negligence, and in the absence of such showing the jury ought to find for the defendant." The following instruction asked by defendant was refused: "3. If the plaintiff's agent who caused the negro mentioned in the petition to be placed in the defendant's possession knew before the 31st of October, 1854, that a negro boy belonging to the defendant watched at the outer door, and opened the same to admit persons, he can not in this place complain that the defendant was guilty of any negligence in permitting said negro boy to watch at the front door and to manage the key thereof." Instructions asked by plaintiff were refused.

The jury found for plaintiff.

S. T. & A. D. Glover and Hannegan, for appellant.

I. There was a total want of proof on the question of negligence.

II. The court erred in refusing the third instruction. (Sto. on Bail. § 74; 13 Ala. 588; 38 Maine, 55; 10 Mo. 568.)

III. There is no averment of negligence in the petition. The law of bailments was construed throughout on the same rules that apply to inanimate property. This was incorrect. (See 2 Pet. 150; 3 Johns. 170; 4 Mart. 55; 2 Wheat. 100; 10 Mo. 568.) The petition was defective.

Shreve, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This case was submitted to the jury upon instructions asked by the defendant, and the verdict being against him he has certainly no right to complain of the instructions given. The third instruction he asked was properly refused, as the circumstance alluded to in that instruction was in evidence before the jury and it was not the province of the court to say what inference they should draw from it. There was evidence of negligence before the jury which justified the verdict rendered; and we should have no disposition to disturb it on the ground of any supposed preponderance of testimony one way or the other.

But we do not see how this judgment can be sustained upon such a petition. There was no averment of negligence in the petition. It is true, the defendant did not demur, but put in an answer averring due diligence on his part and a loss of the negro without his fault, and the case was tried upon the question of negligence or no negligence, upon the basis of the defendant's answer. There was no issue in the case; indeed, no cause of action whatever, so far as I can discover, is stated in the petition. It states a bailment of a slave to defendant for safe keeping, and a refusal of defendant to deliver him up when requested. It is nowhere averred that it was the duty of the defendant to deliver up the slave on request, or that any contract was made, express or implied, to this effect, or that any contract was broken. No conversion is alleged to make it an action of trover (at common law), or any contract stated by which it could be construed as an assumpsit, or any misfeasance or negligence to bring it within the class of actions on the case. The gist of the action, as the facts developed on the trial show, was negligence, but there was no averment on this subject.

The old rule of the English judges that a verdict would supply whatever of necessity must have been proved to the jury has never been held to extend to cases where the *gist* of the action is omitted. Nor have the various statutes of

Andrews v. Lynch.

amendments and jeofails enacted in several of our states and embodying this principle ever been construed to embrace a case where no cause of action is stated. (1 Bac. Abr. p. 16; 1 Petersdorf Ab. 871; Winston's Exec'r v. Francisco, 2 Wash. 189; Chichester v. Voss, 1 Call, 71.) Our statute upon this subject contains nothing new or additional to the old rule. (2 R. C. 1855, p. 1256, clauses 8 and 9.) Indeed, the 10th section of the 6th article of the practice act (R. C. 1855, p. 1232) declares that the objection, that the petition does not state facts sufficient to constitute a cause of action, is not waived by a failure to demur or to suggest the objection in the answer.

The defendant in this case, under the instructions given by the court, was held to that degree of diligence "which persons of ordinary care in their business ordinarily take of their own property." The instruction was the defendant's, and it was certainly not for him to complain of it; but, as the case goes back, we may with propriety suggest whether such a rule of diligence as this is applicable to bailees of this character. If by "ordinary care in their business" is meant such care as was reasonably to be expected of persons engaged in the business which defendant followed, there can be no objection probably to it; but if it was meant merely to require that care or watchfulness which a master usually exercises over his slaves on his farm, or in his work-shop, or about his house, that is not the diligence which he is expected to exercise who is employed in the business defendant undertook.

Judge Scott concurring, the judgment is reversed. Richardson, judge, not sitting, having been of counsel.

Frenz v. Frenz.—Johnson's Adm'r v. McCune.

FRENZ, Plaintiff in Error, v. FRENZ, Defendant in Error.

1. Judgment affirmed.

Error to St. Louis Circuit Court.

Kribben, for plaintiff in error.

Goodlett, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

This cause is before us on a writ of error. No point of law is raised by the record. The sole object of the plaintiff is to obtain a reversal of the judgment of the court below on the ground that the facts warranted a different result from that obtained by the court. We have looked into the evidence preserved in the record and are of opinion that it would not warrant us in disturbing the action of the court below.

Judge Napton concurring, the judgment will be affirmed.



JOHNSON'S ADMINISTRATOR, Respondent, v. McCUNE, Appellant.

1. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (Johnson v. McCune, 21 Mo. 211.)

Appeal from St. Louis Court of Common Pleas.

This case has heretofore been before the supreme court. (See 21 Mo. 211.) The plaintiff introduced in evidence a letter of defendant, which is as follows: "St. Louis, February 7, 1852. Mr. Willis C. Johnson: Dear Sir—I named to you that the company would want your services, last fall

Johnson's Adm'r v. McCune.

when you were about to leave, since which we have made an arrangement with Capt. Dean to take charge of the new boat to be called the Jeanie Deans, and you to go with him. You will please let us know, at your earliest convenience, if it will suit your arrangements to go on her. She will not be out as soon as her contract calls for, on account of the severity of the winter. However, we expect her to be out in April. Yours respectfully. [Signed] J. S. McCune."

Plaintiff also introduced in evidence the following letter from Willis C. Johnson to the defendant McCune: "St. Louis, Mo., September 3, 1852. Mr. John S. McCune: Dear Sir—Last fall you spoke to me in regard to a clerkship in your packet line from St. Louis to Keokuk, and requested me to hold myself in readiness in the spring when navigation should open, to [go] on one of your packets as clerk on the same terms I was clerking on the 'New England.' You were kind enough to commend my faithfulness and business capacity and I promised you I would make no other arrangement that might conflict with taking a clerkship on your line in the spring. In the winter you repeated the request (I think in February) and specially retained me as clerk on the Jeanie Deans, and stated that my services would be needed in April, as the boat would then come out; and you also requested my express agreement to go on the Jeanie Deans at that time. And I handed a note to Mr. Daniel Able, which he gave you, signifying my consent to be clerk on the Jeanie Deans. Now, sir, ever since that time I have been in the constant expectation of the Jeanie Deans coming out, so that I might go to work. In order that I might not disappoint you and the company for whom you act, I have made no other arrangements at all, hoping continually to go upon the Jeanie Deans according to the mutual understanding. When other situations have been offered me I have declined them for the reason mentioned. You may judge how surprised I am, under these circumstances, to find that, after all this delay and disappointment to me, the 'Jeanie' has come out and is now running without notice to me, and that the

clerkship has been given to another. I am confident that it is your intention to do me justice in the premises. It is impossible to think that you contemplate any thing else. I respectfully await your reply to this letter, and will repeat that I rely on your sense of justice for a fair answer. Address me at the Monroe House. I had intended to call and see you and have more conversation than we could have this morning on the street, but I am not very well. Please let me hear from you. Very respectfully. W. C. Johnson." The plaintiff also introduced in evidence McCune's reply to this letter.

The court gave the following instruction asked by defendant: "9. The letter of defendant of date of February 7, 1852, is not a guaranty on the part of defendant that the Jeanie Deans should come out in the month of April, or at any specific time; nor does it operate as an agreement that said boat should come out in the month of April or at any other time."

The court also gave the following instructions for the plaintiff: "1. If the jury believe from the evidence that the defendant contracted as charged in the petition with Johnson for his services as first clerk of the steamer Jeanie Deans at the usual or reasonable rate of compensation for said services, said services to commence when said steamer came out and began running, and agreed that said steamer should come out and commence running in April, 1852, notified said Johnson that said steamer was expected to come out and commence in the month of April, 1852, and said Johnson remained ready and willing to fulfil said contract on his part from said month of April until September 15, 1852, and that said steamer came out and began running prior to said September 15th, and the defendant refused to comply with his contract or to accept the services of said Johnson as contracted for and failed to notify said Johnson of said refusal prior to said September 15th, then the jury will find for the plaintiff and assess the damages at the usual rate of compensation therefor for the time said Johnson was out of employ-

Johnson's Adm'r v. McCune.

ment in consequence of said contract up to said September 15, 1852; unless the jury further believe from the evidence that the contract aforesaid was made under a custom of the company known to said Johnson that the contract might be rescinded at any time thereafter by the defendant or company, if the captain of said steamer was changed and desired a change of clerks, and said contract was so rescinded and the defendant notified thereof prior to any damage sustained by the said Johnson from the nonperformance of said contract by the defendant and the said Keokuk packet company. 2. If Johnson was employed by defendant in February, 1852, to go as first clerk on the Jeanie Deans when she should come out, and also agreed the said boat should come out in April, 1852, and said Johnson held himself in readiness to perform said agreement on his part, and defendant was not ready to accept his services until August 18th, and then failed and refused to accept the same, they will find for plaintiff the value of plaintiff's services, whether rendered or not."

The jury found for plaintiff.

Shepley, for defendant.

S. T. & A. D. Glover, for respondent.

I. Instructions numbered one and two, given for the plaintiff, were given on the first trial, and passed the ordeal of this court when the case was here before.

NAPTON, Judge, delivered the opinion of the court.

The instructions in this case are inconsistent with each other. The court declares that McCune's letter of February, 1852, did not amount to a contract that the Jeanie Deans should be out in April, in accordance with the decision made by this court when the case was here before; (see 21 Mo. 215;) but gives the first and second instructions on behalf of the plaintiff, which are altogether based upon the hypothesis that such a contract was made. The only proof of such a contract was McCune's letter of February, 1852.

The plaintiff's conduct and letter of September 3d, 1852, are not at all reconcilable with the claim he asserts in this case for wages from April 1, 1852, to September 15, of the same year. The letter of the 3d of September does not allude to any claim for back wages, and if he had *then* been employed would he have been entitled to wages from the 1st of April? Is it not remarkable that from the 1st of April to the 18th day of August, when the Jeanie Deans made her first trip, that Johnson never made any inquiries of the company relative to the time they would probably want his services, and never advised them that he considered himself all that time on wages? Ought he not, if he so regarded the engagement between him and McCune, to have reported himself and informed them that he was idle, waiting on them for employment? Is it not reasonable that such would have been his course? If the company had been apprised of this, and had understood the contract as he did, they might, with his consent, have furnished him with other employment equally acceptable to him and profitable to them. But it does not appear that from the 1st of April down to the 18th of August the plaintiff, though frequently in St. Louis, ever mentioned the subject to McCune, and it was not until the 3d of September that he spoke to him, and his letter of that date does not complain of the nonpayment of past wages.

If no wages for the time previous to the coming out of the Jeanie Deans were due to Johnson, then the damages arising from the breach of the contract to employ him at that time, if such a breach occurred, must be estimated as they would be for the breach of any other contract, without reference to what had occurred previously.

The judgment is reversed and the cause remanded; Judge Scott concurring. Judge Richardson not sitting, having been of counsel.

Snead v. Wegman.

SNEAD *et al.*, Plaintiffs in Error, v. WEGMAN, Defendant in Error.

1. A justice of the peace, under section 21 of the second article of the attachment act of 1845 (R. C. 1845, p. 151), ordered the sale of a wood-boat in the custody of a constable under a writ of attachment issued by said justice. *Held*, that, on a final determination of the attachment suit adversely to the plaintiff therein, the defendant would be entitled to the entire proceeds of the sale of the boat, and might recover the same from the constable, although no order had been made by the justice with respect thereto.
2. Any sum that might be allowed the constable, under section 45 of the second article of the attachment act of 1845, as compensation for his trouble and expense in keeping the boat, should be taxed as costs in the cause and would fall on the unsuccessful party; the constable would not have a lien on the proceeds of the sale of the boat for the necessary expenses of keeping and selling it.
3. Only the interest of the defendant in the attachment could be attached and sold; hence he alone could sue the constable for the proceeds of the sale of the boat.

Error to St. Louis Law Commissioner's Court.

Wegman, a constable of St. Louis township, in obedience to a writ of attachment issued by John Black, a justice of the peace in and for said township, seized as the property of Snead a wood-boat lying at the wharf in St. Louis. The justice afterwards, on the petition of said constable, ordered said boat to be sold as perishable property. The boat was sold under this order for \$100. The costs, charges and expenses of the safe keeping and sale of the boat were \$72, leaving a balance of \$28 in the hands of the constable. After the sale there was a trial in the justice's court and judgment was rendered for the plaintiff in the attachment. The defendant Snead appealed and the plaintiff was nonsuited in the law commissioner's court. No order was ever made requiring the constable to pay over the proceeds of the sale to any one.

This suit was brought by plaintiff Snead and another to recover the \$100, the proceeds of sale. They alleged that they were joint owners of said wood-boat. The court gave judgment for plaintiffs for \$28, declaring the law to be as fol-

Snead v. Wegman.

lows: "3. In this case the defendant had a lien on the proceeds of the sale of the property in his hands for the necessary expenses of the safe keeping and sale of said boat." Plaintiff sued out his writ of error.

D. C. Woods and Buckner, for plaintiffs in error.

I. The defendant had no lien on the proceeds as declared by the court. The officer held the proceeds just as if they were the goods themselves. The case was decided for the defendant. The plaintiff was not entitled to the goods; why should the officer be? The costs fell on the losing party.

II. The defendant in his answer alleged a tender of \$28, the balance of the \$100. He waived the necessity of an order on him to pay over any sum in his hands. There was testimony tending to show that he had been served with an order to pay over the proceeds.

Krum & Harding, for defendant in error.

I. Wegman was not bound to take notice of the judgment of nonsuit on appeal to the law commissioner's court, there being no certificate of any such judgment sent down to the justice. The officer had the right to retain the proceeds of the sale until the final determination of the cause and to then dispose of the fund according to the order of the court.

II. The plaintiffs can not sue jointly. The money in the defendants' hands were the proceeds of Snead's interest in the boat and not the interest of his co-owner. If it belongs to either, it is to Snead alone.

RICHARDSON, Judge, delivered the opinion of the court.

The twenty-first section of the second article of the attachment act of 1845 declares that "when property shall be seized on attachment, which is likely to perish or depreciate in value before the probable end of the suit, or the keeping of which would be attended with much loss or expense, the justice may order the same to be sold by the constable in the same manner and on the same notice as goods are required

to be sold on *feri facias*, and the proceeds of such sale shall remain in the hands of the constable, subject to be disposed of as the property would have been subject if it had remained in specie." It can not be doubted that if the boat had not been sold Snead would have been entitled to the possession of it after the dissolution of the attachment by the nonsuit of the plaintiff; and having prevailed in the suit, judgment for costs would have been rendered against the losing party. The forty-fifth section of the same act provides, that "when property is seized on attachment, the justice may allow the officer having charge thereof such compensation for his trouble and expenses in keeping and maintaining the same as shall seem reasonable and just;" and, as the measure of compensation is not fixed by law, the officer is not permitted to determine the amount, but it must be ascertained and allowed by the justice; and until it is so allowed he has no demand against either of the parties to the suit. When, however, his compensation for his trouble and expenses in taking care of the property is properly allowed, the allowance would be taxed as costs in the cause and would fall on the unsuccessful party.* The boat having been sold, Snead had the right after the nonsuit to follow the proceeds of the sale in all respects as if the property had remained in specie; and if he was not liable for the general costs of the suit, it is difficult to perceive on what principle he was bound to pay this demand of the constable.

The defendant tendered to the plaintiffs before the commencement of this suit a portion of the proceeds of the sale, and it can not now be said that he had no notice of the dissolution of the attachment.

The attachment was against Snead alone, and the officer could only seize and sell his interest; therefore the money in the defendant's hands belonged to Snead, in which his co-plaintiff had no interest and was improperly joined in the action; but the objection to the misjoinder was not raised in the court below, and if it had been taken the petition could

Pearce v. Roberts.

have been amended by striking out the name of Shelton. (2 R. C. 1855, p. 1253.)

The judgment will be reversed and the cause remanded, with leave to the plaintiffs to amend the petition by striking out the name of Shelton. The other judges concur.

PEARCE, Respondent, v. ROBERTS *et al.*, GARNISHEES, Appellants.

1. A factor may pay over to his principal the proceeds of goods consigned to him for sale, although he may know that his principal had promised to pay certain of his creditors out of such proceeds.

Appeal from St. Louis Court of Common Pleas.

Pearce instituted a suit by attachment against James and Henry Burns (the latter of whom died pending the suit), of the firm of Burns & Bro., on two promissory notes. Roberts and Kerr were summoned as garnishees. They answered denying all indebtedness to Burns & Brother. On the trial of this issue the plaintiff introduced the following memorandum: "Warsaw, Benton Co., Mo., January 24, 1854. Received of Messrs. Houseman, Lowry & Co., of St. Louis, Mo., \$1,074.09 as an advance in cash on lard in barrels and kegs, hams, shoulders and sides in bulk, the product of 360 hogs, now stored in L. H. Hick's warehouse in Warsaw—the same to be shipped to Messrs. Houseman, Lowry & Co., St. Louis, on opening of navigation, for sale on account of Messrs. Burns & Brother—and to be covered by Messrs. H., L. & Co. by fire and marine insurance, and now subject to their order, control and possession; proceeds, after the above advance and charges, to be subject to the order of Messrs. Burns & Brother. [Signed] Burns & Brother."

Mr. Houseman, of the firm of Houseman, Lowry & Co., left the lard, &c., mentioned in the above instrument in the charge of his agent, Blakey, who had in his possession the

key of the warehouse in which said lard, hams, &c., were stored. At the time of the execution of the above memorandum by Burns & Brother, they expressed the desire to Houseman that he would use the proceeds of the sale of said lard, hams, &c., in payment of the debt due H., L. & Co., and out of the surplus pay off other debts owing by said Burns & Brother. They also requested that he would accept drafts drawn by them for the supposed surplus. He stated to them that they might draw, but he would not accept until a sale had been made and there was a surplus. Such drafts were presented, and acceptance was refused, but Houseman promised that he would pay them if there should be a surplus sufficient therefor. The goods were not shipped to Houseman, Lowry & Co., but were consigned to the garnishees in this case by Martin & Cook. (Martin was a brother-in-law of James and Henry Burns.) Out of the proceeds of the shipment Roberts, Kerr & Co. paid Houseman, Lowry & Co. their demand, and placed the balance to the credit of Martin & Cook. They also, previous to the service of the garnishment process in this case, sold to Martin & Cook a bill of groceries, which was charged to their account, leaving a balance in favor of Martin & Cook of \$84.15.

The court, at the instance of the plaintiff, gave the following instruction: "1. If the jury find that the property attached in the hands of the garnishees was at the time of the attachment the property of Burns & Brother, and that garnishees had been notified that Houseman, Lowry & Co. and other creditors of Burns & Brother had claims against it, and that it did not belong to Martin & Cook, then the garnishees can not be permitted to apply the said property to the payment of debts contracted with them by Martin & Cook subsequent to the time of being so notified."

At the request of defendants the court instructed the jury as follows: "1. Unless the jury find that defendants were indebted to Burns & Brother at the time of the garnishment, or had property in their hands at the time belonging to Burns & Brother, then they will find for defendants. 2. If

Pearce v. Roberts.

the jury believe from the evidence that defendants had no knowledge of any other claims against the property than that of Houseman, Lowry & Co. at the time of their sale of the property and their sale of the bill of goods to Martin & Cook, and that the sale of the merchandise was made with the consent of Houseman, Lowry & Co., and that they complied with their agreement with said H., L. & Co., then they will find for defendants, excepting as to the balance in defendants' hands after being paid for goods sold by them to Martin & Cook."

The court refused the following instruction asked by defendants: "The jury are instructed that the goods became the property of Houseman, Lowry & Co. at the time of making the paper dated January 24, 1854, and the delivery by possession thereof to him; and if they find that he retained said property and that the same was sold by defendants with their consent, then they must find for defendants."

The jury found for the plaintiff, and found that at the date of the garnishment defendants had in their hands \$534.78 belonging to Burns & Brother. The court rendered judgment in favor of plaintiff for \$328, the amount recovered by plaintiff against James Burns, defendant in the attachment.

Biddlecome, for appellants.

Wickham & Snead, for respondent.

I. The garnishees, having been notified that the consignment to them by Martin & Cook was fraudulent, could not after such notification defeat the claim of an attaching creditor of the rightful owner by placing the proceeds of sale to the credit of the fraudulent consignor. (Pool v. Adkinson, 3 Dana, 115; Story on Agency, § 360; 19 Pick. 230; Drake on Attachment, § 414; Cushing on Trustee Process, § 26-8, 35-40.) After Houseman, Lowry & Co. had received satisfaction of their advances, and had surrendered possession of the property to appellant, they had no further claim to said produce, they having refused to accept the drafts drawn upon them by Burns & Brother against the surplus proceeds of sale of the produce.

RICHARDSON, Judge delivered the opinion of the court.

Though the warehouse receipt executed by Burns & Bro. to Houseman, Lowry & Co. gave to the latter the right to the possession of the property until their advances were refunded, it evidently was only intended as a security, and Burns & Bro., by paying the debt, could have extinguished the lien, or they could have transferred their equity to another person who, on succeeding to their rights, would have held the property, by paying Houseman, Lowry & Co., free from the claims of the creditors at large of Burns & Bro.

If Houseman, Lowry & Co. had received the property under a stipulation to sell it and apply the proceeds to the payment of their debt, and the residue to other named debts, a trust would have attached upon it in their hands, from which they could not have been relieved merely by obtaining satisfaction of their own debt; but the trust would have continued and have followed the property into the hands of every other person who received it with notice. But the receipt on its face conferred no rights and imposed no duties except as between the parties to it, and, from any thing that appears in the record, there was no lien or claim on the property as against Burns & Bro. in favor of any person except Houseman, Lowry & Co., and Burns & Bro. had the power of transferring it, subject only to one claim, to any *bona fide* creditor or purchaser; and their promise to pay other creditors the surplus created no lien upon it.

A factor must know whose property he is selling, and must respect at his peril any valid liens on it; but he has the right to pay the proceeds to the owner, or to his order, although he may know that the owner has promised them to his creditors. So, if the consignment had been received directly from Burns & Bro. the defendants would have had no reason, before they were garnished, to withhold the proceeds of the sale after paying Houseman, Lowry & Co. for the benefit of the general creditors of Burns & Bro.; and, conceding that the transfer to Martin & Cook was made with a fraudulent purpose, it was good against Burns & Bro., and was sufficient, as

Pearce v. Roberts.

far as they were concerned, to authorize Martin & Cook to direct the disposition of the proceeds of the consignment.

It appears that the property came to the defendants under a consignment from Martin & Cook; that it was sold and the debt paid to Houseman, Lowry & Co., and, though Mr. Houseman says, "I think I told them that there were some drafts to be paid," there is not a word in the record to show that a draft had been drawn in favor of the plaintiff, or that he had a lien on the property of any kind, or that the defendants ever knew he was a creditor.

An ordinary draft in favor of the plaintiff on Houseman, Lowry & Co. would not have operated as an assignment of any interest in the property; (*Kimball v. Donald*, 20 Mo. 577;) and notice to the defendants that the creditors of Burns & Bro. had been promised payment out of the proceeds of the sale of the property would not have prevented them from paying the proceeds to the owners, their agents or their vendees.

There is no evidence that any of the creditors of Burns & Bro., except Houseman, Lowry & Co., had claims against the property, and the instruction therefore given by the court, at the plaintiff's request, was erroneous in assuming that there was evidence that "other creditors of Burns & Brother had claims against it."

If the property really belonged to Burns & Bro. the defendants are liable for whatever was in their hands at the time they were garnished; but they are not liable for any thing they had paid, or for the amount taken in goods by Martin & Cook, unless they were guilty of fraud, and participated with Martin & Cook and Burns & Bro. in a scheme to cheat the creditors of the latter.

The case was not put on trial on the ground of fraud, neither in the proof nor in the instructions asked or given.

The other judges concurring, the judgment will be reversed and the cause remanded.

PATRICK *et al.*, Respondents, v. ABELES, Appellant.

1. Although, in a suit instituted to enforce a mechanic's lien, the plaintiff may fail to show the existence of a lien in his favor, he will be entitled, if the pleadings and the evidence will warrant, to a general judgment.
2. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence.

Appeal from St. Louis Land Court.

Plaintiffs in their petition (filed September 19, 1855) alleged an indebtedness on the part of defendant for lumber furnished to defendant for the construction of a certain building in the city of St. Louis. The plaintiff prayed judgment for the amount of the alleged indebtedness and also that execution might issue against the building, against which it was alleged plaintiffs had filed a lien demand. The suit was commenced in the circuit court. It was removed by consent of parties to the St. Louis land court. It appeared in evidence that the building in question had been constructed for defendant by one John G. Lare; that the lumber had been furnished immediately to Lare. There was evidence tending to show that it was so furnished on the credit of defendant Abeles. The account accompanying the petition was made out against John G. Lare. Plaintiffs also introduced in evidence the lien papers filed by them against the building. It did not appear that the required thirty days' notice of the claim of lien had been given to Abeles. At the close of plaintiffs' case, the court refused to instruct the jury that plaintiffs could not recover. At the close of the whole case the court, at the instance of the plaintiff, gave the following instruction: "1. If the jury believe from the evidence that the lumber sued for was furnished on the credit of Abeles and not on that of Lare, and was used in the construction of defendant's house, the defendant is liable to pay for it." The following instructions were given at the instance of defendant: "2. If the jury believe from the evi-

Patrick v. Abeles.

dence that the lumber and materials sued for in this suit were sold by plaintiffs to John G. Lare on his own responsibility and charged to him alone, they will find for the defendant. 3. If the jury believe from the evidence that the lumber, &c., sued for in this suit was purchased by John G. Lare for himself and upon his responsibility and not the defendant's, then they will find for the defendant."

The jury found for plaintiff, and a general judgment was rendered in his behalf.

Cline & Jamison, for appellant.

I. The court erred in refusing the instruction asked by defendant at the close of plaintiffs' case. The lien filed was against John G. Lare, the contractor. The plaintiffs were sub-contractors. They failed to give the required thirty days' notice. There was no evidence showing a tendency to show that any such notice was given. If credit was originally given to the defendant, the lien demand should have been made out against Abeles as well as Lare. The lien read in evidence was insufficient to support the plaintiffs' petition.

II. If the lumber sued for was furnished and delivered upon the credit of the defendant, and the plaintiffs endeavored to recover the same from the defendant irrespective of the lien as filed, then the St. Louis land court did not have jurisdiction over the same. Consent can not give jurisdiction. (20 Mo. 350.)

H. N. Hart, for respondents.

Scott, Judge, delivered the opinion of the court.

The nature of this action must be determined by the petition filed in the cause. Although the proceedings, as instituted, would, with proper evidence, have warranted a judgment for the sale of the property under the lien, yet, failing to obtain a judgment under that law, there was nothing to prevent the plaintiffs from having a general judgment if the pleadings and evidence warranted it. As the petition alleged

that the defendant owed the plaintiffs for lumber furnished him for building his house, if the fact was established it would clearly authorize a general judgment. As to the evidence, the verdict of the jury shows its sufficiency.

The circumstance that the account was made out against the contractor was not a matter in bar of the action, but a matter to be weighed by the jury in determining the question of the defendant's liability on his alleged personal undertaking. It was not conclusive evidence, as, notwithstanding such an account, the plaintiff could show that the credit was given to the defendant.

Even admitting that the court at the close of the plaintiffs' case might have instructed the jury that they failed to make out a cause of action under the law concerning liens, yet, as the instruction was refused, and in the further progress of the cause it was ascertained that the defendant was indebted to the plaintiffs and the jury so found, and such finding meets with a support in the pleadings, on what ground in law or justice should the judgment now be reversed for refusing an instruction which, had it been given, as it afterwards turned out, would have defeated the justice of the cause? The case on its merits was fairly put to the jury, all the instructions asked on either side having been given, and we see no reason for disturbing the judgment of the court.

As to the question of jurisdiction, although consent can not give it, yet after the cause was taken by consent of the parties to the land court, they might have left that question to be raised by some other person. But, as was said in the case of *McCune v. Hall*, 20 Mo. 596, this court will not put such a construction upon the act organizing the land court as will make it necessary for parties first to try their actions in order to find out what court has jurisdiction to hear and determine them. Here is a case which might have been heard in either court according to the evidence. Having been determined in one of them, there is no reason for reversing the judgment. It would be extremely inconvenient to make the jurisdiction of a cause depend upon the evidence

Hempstead v. Hempstead's Adm'r.

produced at the trial. This is not such a question of jurisdiction as arises between courts of different classes or grades. The jurisdiction of one court has been distributed among several. It was impossible to draw a clear line defining the jurisdiction of each. There must be necessarily some cases in such a distribution as will make it a matter of doubt where they are to be tried. In such we see no reason why the jurisdiction should not depend on the form of the action and not on the facts proved on the trial.

Judge Napton concurring, the judgment is affirmed.

HEMPSTEAD, Plaintiff in Error, v. HEMPSTEAD'S ADMINISTRATOR *et al.*, Defendants in Error.

1. A judgment was recovered against A. and B. on an official bond in which B. was principal and A. his security. B. died leaving him surviving a widow and daughter, his only heir. A. was compelled to pay a portion of the judgment. C., to whom the judgment had been assigned and who had control over it, in consideration of the compromise and dismissal of various suits instituted against him by the heir of B., covenanted by instrument under seal with the said widow and heir never to use or enforce said judgment so far as the same could be made to affect the heirs, executors, or administrators of B., or any property owned by them as such heirs, &c., except as to two specified tracts of land, with respect to which he reserved the right of using said judgment as he might see fit. He also reserved the right of using said judgment against A. and his property. Notwithstanding the execution of this instrument, C. procured the allowance by the probate court of said judgment as a claim against B.'s estate, and it was classed in the fourth class of allowed claims. A. procured the allowance in his favor of a claim against B.'s estate for the amount paid by him in part satisfaction of said judgment; this claim was assigned to the fifth class. *Held*, in a suit instituted by A. against B.'s administrator and C. for the purpose of having the allowance of said judgment in C.'s favor set aside and the assets in the hands of the administrator applied to the payment of A.'s claim, that the instrument executed by C. operated a release of the judgment as against B.'s estate; that (the claims of A. and C. being the only allowed claims) C. was not entitled to have said judgment allowed as a claim against B.'s estate so as to protect the assets thereof (except the excepted property) from the payment of the claim of A.; that said instrument operated a like release of the judgment as to A., he being only a security.

Hempstead v. Hempstead's Adm'r.

Error to St. Louis Circuit Court.

This was an action by Charles S. Hempstead against John D. Wilson, administrator of the estate of Thomas Hempstead, deceased, and John Biddle. The petition set forth that Thomas Hempstead was an officer of the United States government; that plaintiff was the security upon his official bond; that on the 7th of June, 1823, judgment was rendered on said official bond against said Thomas as principal and plaintiff as security, in the district court of the United States for Missouri, for the sum of \$13,497.27; that said Thomas Hempstead left the United States and was last heard of in Spain in the year 1827; that plaintiff was compelled by executions to pay money upon said judgment at various times; that the defendant Biddle obtained the control of said judgment with power to release the same; that said Thomas left one child only, a daughter; that said daughter, being the sole heir of said Thomas, in 1845 or 1846 brought suits against said defendant Biddle for the recovery of certain property in the possession of said Biddle, which she claimed as descending to her from her father, the said Thomas; that as a part consideration for the withdrawal of said suits the said Biddle released the said judgment in favor of the United States and of which he had control so that the same should no longer be a charge upon the estate of the said Thomas; that though said release was executed by the said Biddle and was in the hands of the agent of the said sole heir of said Thomas Hempstead, by a fraudulent contrivance between the said Biddle and the said heir the said release was not entered of record, but the judgment was fraudulently allowed to stand unsatisfied for the purpose of defrauding plaintiff and compelling him to pay the same notwithstanding it had been released; that in the year 1848 the defendant Wilson married the said heir of said Thomas, Cornelia V. Hempstead; that in June, 1850, letters of administration were granted by the probate court of St. Louis county upon the estate of Thomas Hempstead to said Wilson; that in March, 1851, by the con-

Hempstead v. Hempstead's Adm'r.

nivance of the said Wilson, the said judgment was revived in favor of the United States, to the use of said Biddle, the said Wilson well knowing that the same had been released; that the judgment so revived was presented in the probate court for allowance against the estate of said Thomas; that the probate court refused to allow the same; that an appeal was taken to the circuit court; that by the fraudulent practices and the connivance of the said Wilson and Biddle a decree was obtained in the circuit court that said judgment be allowed by the probate court, though the said Biddle did not intend that any thing should be paid by the said Wilson, administrator; that on the 15th of June, 1852, said judgment, amounting to nearly \$40,000, was allowed by the probate court, and placed in the fourth class of claims allowed against the said estate; that at the March term, 1853, of said probate court, a claim was allowed in favor of plaintiff against the estate of said Thomas, amounting to \$10,244.67, for moneys paid on the aforesaid judgment; that said claim was placed in the fifth class of claims; that no other claims than the aforesaid have been allowed against the said estate; that property to a large amount belonging to the estate of said Thomas Hempstead has come into the hands of said Wilson as administrator; that under the fraudulent pretence of paying said judgment allowed in favor of said Biddle, Wilson obtained an order of the probate court for the sale of property belonging to the estate of said Thomas; that at the December term of said court he sold property and received \$7,630, as appears by his report to the court; that at the December term, 1854, he sold other property, said Biddle becoming the purchaser at a price of \$3,650; that said Biddle and Wilson, having received notice that plaintiff intended to move the court to have the proceeds of said sale applied to his claim, fraudulently combined to suppress said sale and no report was made of it to the probate court; that at the September term, 1855, of the probate court, the said administrator Wilson sold property amounting to \$957, as appears by his report; that nothing has been paid upon said judg-

Hempstead v. Hempstead's Adm'r.

ment in favor of said Biddle; that it was not intended by Wilson and Biddle that any thing should be paid upon it; that said sales were not made for the purpose of paying said judgment, or any debt of the estate of said Thomas Hempstead, but were made for the purpose of defrauding plaintiff of his just claim; that said judgment, by a fraudulent combination between Wilson and Biddle, is held as a cover for the assets of the said estate, and to prevent plaintiff from obtaining satisfaction of his just claim; that said judgment is more than sufficient to cover all the assets of the estate; that by the corrupt and fraudulent practices of the defendants plaintiff is defrauded of his just debt against said estate; that the probate court refuses to entertain jurisdiction of this cause, to set aside the allowance of said judgment and grant relief to plaintiff. "The plaintiff therefore prays this court to take cognizance of this case, to set aside the allowance of said judgment in favor of said Biddle against the said estate, to cause the assets of said estate to be equitably applied to the payment of plaintiff's claim, and for such other and further relief," &c.

Defendants answered separately, denying any release of the judgment mentioned in the petition, and denying the fraud alleged.

At the trial by the court without a jury, the plaintiff offered in evidence the following instrument in writing: "I, John Biddle, of Detroit, in the state of Michigan, hereby covenant and agree with Cornelia Hempstead, widow, and John D. Wilson and Cornelia V. Wilson his wife—which Cornelia V. is a child and sole heir of said Thomas Hempstead—in manner following, that is to say: Whereas I am the owner and assignee of a certain judgment rendered in the United States district court for Missouri, on the 2d day of June, in the year 1823, for the sum of \$13,497.27, in favor of the United States against Thomas and Charles S. Hempstead; I have compromised a certain suit in chancery this day, wherein John D. Wilson and wife and Charles Gibson are complainants, and myself, John O'Fallon and others are defendants,

Hempstead v. Hempstead's Adm'r.

and they have quit-claimed all their right in the lands in controversy in that suit, and agreed to dismiss that suit, and as part of the consideration for such quit-claim and dismissal of said suit and release of their cause of action therein is the release of the estate of said Thomas Hempstead from said judgment as hereinafter specified: Now therefore I hereby, for my heirs, representatives and assigns, agree and covenant that said judgment shall never be used or enforced in any manner against the heirs or administrator of said Thomas Hempstead, unless for the purpose of affecting the two pieces of land of forty arpens and of five arpens hereinafter mentioned, nor against any property belonging to his estate or to his heirs as derived from him at any time, except however the tract of forty arpens lying in the common field of St. Louis, being the same conveyed to Thomas and Charles S. Hempstead by Margaret Hebert *dit* Lecompte by deed dated the 8th day of January, 1818, recorded in book G, page 11, and except also a piece of five arpens, being on the south of said forty arpens tract, and conveyed to William C. Carr by Thomas and Charles S. Hempstead by deed dated the 26th day of August, in the year 1819, recorded in book J, page 165; against which said two pieces of land (the last of which pieces of land I am the owner of, and the eastern portion also of the former I am the owner) I reserve the right of using said judgment as I may see proper, and also of using the names of the heir and representatives of Thomas Hempstead, deceased, for the purpose of selling or otherwise affecting the same lands, but always at the proper costs of myself or my representatives. And I also have the right of using said judgment as I may see proper, and also of using the names of the heir and representatives of Thomas Hempstead, deceased, for the purpose of selling or otherwise affecting the same lands, but always at the proper costs of myself or representatives. And I also have the right of using said judgment against Charles S. Hempstead and his property; but, with the exception of the whole of the said forty arpens and of the said five arpens, I am not to use or enforce

Hempstead v. Hempstead's Adm'r.

said judgment so far as the same can be made to affect the heirs, executors or administrators of the said Thomas Hempstead, or any property owned by them or any of them as such heirs or executors or administrators. In testimony whereof I have hereto set my hand and seal this 7th day of December, 1849. [Signed] John Biddle. (Seal.)"

The court, at the instance of defendants, excluded said instrument as incompetent. The plaintiff thereupon moved the court to permit an amendment of the petition "so as to meet the proof contained in said paper writing." The court refused to grant the motion; whereupon plaintiff took a nonsuit, with leave, &c.

Munford, Jones & Sherman, for plaintiff in error.

I. The court erred in excluding the instrument signed by John Biddle. It was a full and fair release of the judgment as to Hempstead's estate; if not technically, then in spirit and substance. Had it been produced before the probate court, the judgment never would have been allowed. The writing showed a fraudulent combination between defendants to obtain an allowance of the judgment. If the proof contained in said writing did not technically sustain the petition, the court should have allowed plaintiff to amend.

S. T. & A. D. Glover, for defendants in error.

I. The instrument offered in evidence was not a release; it was not therefore pertinent to the issue between the parties. It contemplates that the judgment shall for many purposes continue in force; this is irreconcilable with the idea of a release. (See *Parker v. Holmes*, 4 N. H. 97.) At most it contains an agreement between the widow and heir of Thomas Hempstead to use the judgment in a particular manner; not to extinguish the judgment, but to keep it alive and control it. The widow and heir of Thomas Hempstead only were parties to the contract. The administrator was not, and had no interest in it. A covenant not to sue one co-obligor is no release of the other. (14 Pick. 123; 17

Hempstead v. Hempstead's Adm'r.

Mass. 581 ; 9 Cow. 37 ; 4 Greenl. 421.) There is no equity in plaintiff's bill. He could obtain all the relief he prays by proceeding in the probate court. To obtain the relief sought the heirs of Thomas Hempstead should be before the court. The heir of Hempstead might legally cancel said contract or waive the benefit of it, and no one could complain of it. It would be no injury to any one else. The administrator of Hempstead had no right to enforce said contract. Biddle reserved the right to enforce the judgment as against the two tracts of forty and five arpens. He therefore had a right to have it allowed by the probate court. The whole judgment might be exhausted in the sale of T. Hempstead's right and claim to said tracts. These tracts were worth three times the amount of the judgment. The court properly refused to allow an amendment of the petition.

SCOTT, Judge, delivered the opinion of the court.

The question in this case is whether the court below properly rejected as evidence the release of John Biddle offered by the plaintiff with a view to show that the defendant Wilson, who is the administrator of Thomas Hempstead and the husband of his heir Cornelia Hempstead, had no right to keep on foot, to his prejudice, the judgment mentioned in the release.

The release of the judgment against Thomas Hempstead by Biddle was with the exception that the judgment might still be used in the event it should become necessary for the protection of two parcels of land conveyed to Biddle. These parcels were the subject of a suit between Mrs. Wilson, as the heir of Thomas Hempstead, and John Biddle. The suit was compromised by the heir conveying to Biddle the land she sought to recover from him. Among other considerations for this compromise, Biddle released the heirs, executors and administrators of Thomas Hempstead from the judgment which has given rise to this litigation, except so far as it might be necessary to use it for the protection of the title

Hempstead v. Hempstead's Adm'r.

to the land which Biddle obtained by his compromise with the heir.

The plaintiff is a creditor of Thomas Hempstead; and Wilson and his wife (the heir of Hempstead) claim that they have a right to keep on foot the released judgment to the exclusion of other creditors until that judgment is ratified, it being a debt of a preferred class. The interest in the land that was passed away by the compromise of Mrs. Wilson with Biddle was subject to the payment of the debts of Thomas Hempstead. His creditors, by taking the proper steps, may subject the interest owned in the land by Hempstead to the payment of their debts. Mrs. Wilson, as heir, held the land subject to the payment of debts. If she, as heir, aliened the land and by that act obtained a release of the estate from a judgment, why should not a creditor have the benefit of that release, he being willing to abide by the act by means of which it was obtained? If this is not allowed, the creditors may avoid the compromise, and have the land sold which has been aliened away. Thus, by seeking to appropriate the released judgment to her use, and not to the benefit of the estate of her ancestor, she forces a violation of the compromise she has made, although she may have received other considerations for it than the release, thus placing Biddle where he was before the compromise minus the sum he may have paid for it in addition to the release. As the land which Mrs. Wilson aliened was subject to the payment of debts, and as by means of that alienation she has obtained a release of the estate of her ancestor from a judgment, there is no reason why a creditor should not have the benefit of it, as property in which he had an interest has been the means of obtaining it. Independently of the natural equity of the thing, justice to Biddle requires that such should be the construction of the contract, otherwise he is deprived of the sole advantage he sought by his compromise. We are considering this on principle. The record shows that Biddle is hostile to the claim of the plaintiff; that he does not seek the benefit of the construction we have put

Hempstead v. Hempstead's Adm'r.

upon the contract. But the release is before us. It speaks for itself, and neither the conduct nor declarations of Biddle can vary its interpretation to the prejudice of third persons.

It may be urged that Biddle has purchased the interest of the heir, whatever it may be, and whatever she may have received for it is no concern of the creditor, as he is still free to act as though no alienation of the land had been made, no compromise effected; that there is no privity between the creditors and heir, no relation of trustee and *cestui que trust*, which entitles the creditor to any advantage or profit the heir may make by means of the inheritance. Take it that the intimation thrown out in relation to this case is untenable, yet the fact is the estate of Hempstead has been released from the judgment. Because the heir procured the release, she has no right to regard it as an assignment to herself; there is nothing in the instrument which shows that it should enure to her benefit. On the contrary, such an idea by forcing the creditors to disturb the compromise, brings about the very state of things it was designed to prevent. The paper executed by Biddle is no assignment of his judgment to Mrs. Wilson; with the exception above referred to, it is a clear release. It stipulates that he is not to use or enforce said judgment so far as the same can be made to affect the heirs, executors or administrators of said Thomas Hempstead, or any property owned by them or either of them as such heirs, executors or administrators. The instrument also recites that the release of the estate of Thomas Hempstead, from said judgment is part of the consideration of the compromise. It is obvious that if this paper does not operate as a release it does not operate at all, and that it can not be construed into an assignment of the judgment.

The only difficulty that suggests itself in relation to the views first expressed about the case as to the right of the creditor to adopt the act of the heir arises in the event there are more creditors than one, and they do not unite in the adoption of the compromise. In such case, a portion of them by adopting it could not affect those who are unwilling

Carr v. Steamboat Michigan.

to do so. Those not agreeing to the compromise would have a right to sell the land compromised away, and by so doing would destroy the compromise and take away its benefits from those who are willing to abide by it. There is but one creditor in this case as it appears.

As to the attempt by Biddle to hold the judgment as against Charles H. Hempstead, who is a mere surety, it is futile. One joint co-obligor may be relieved from his portion of the obligation. But the release of the principal in an obligation will certainly discharge the surety; otherwise, if the surety is compelled to pay the debt, he will force the principal to reimburse him and thus the effect of the release will be destroyed.

The judgment is reversed and the cause remanded. Judge Napton concurs. Judge Richardson not sitting, having been of counsel.

CARR *et al.*, Respondents, v. STEAMBOAT MICHIGAN, Appellant.

1. Where there is a privilege of reshipping reserved in a bill of lading, the carrier will be liable for any loss occurring on the boat on which the goods are reshipped, if under like circumstances he would have been liable had the loss occurred on his own boat.
2. The reservation in a bill of lading of the "privilege of reshipping" confers only the right of transferring the goods shipped to another boat or vessel for the purpose of being transported to the port of destination; it will not authorize the temporary storing of the goods on a wharf-boat at the point of reshipment; nor will the carrier, in order to escape liability for the loss of the goods while stored on a wharf-boat at Cairo with a view to reshipment to St. Louis, be permitted to show that "the usual and customary mode of reshipping was to place the cargo on wharf-boats at Cairo, to be taken therefrom by other boats bound for St. Louis."

Appeal from St. Louis Court of Common Pleas.

The defendant's offer to prove a custom, as appears from the bill of exceptions, was as follows: "The defendant then offered evidence to show, that, under bills of lading similar to

Carr v. Steamboat Michigan.

the one offered in evidence by the plaintiff, it was the usual and general custom, upon the arrival of boats at Cairo, Ill., from New Orleans, with cargoes for St. Louis, and the condition of the river was such that the boats could not reach St. Louis, to reship the cargo on boats of lighter draft; and that the usual and customary mode of reshipping was to place the cargo on wharf-boats at Cairo, to be taken therefrom by other boats bound for St. Louis." The court refused to receive the offered evidence.

Hudson & Thomas, for appellant.

Krum & Harding, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs shipped at New Orleans four cases of merchandise, which the defendant contracted to transport and deliver at St. Louis, "the dangers of the river and fire only excepted," and in the bill of lading reserved the "privilege of reshipping." This action is brought for a breach of the contract in failing to deliver the goods. It appears that the boat proceeded on her voyage as far as Cairo, and not being able to proceed further immediately on account of the condition of the river, her officers transferred her cargo to the wharf-boat at Cairo, with instructions to reship the same on smaller boats, and then returned to New Orleans. The wharf-boat sank a few hours after the Michigan left and the plaintiffs' goods were lost. The defendant offered on the trial to prove that the wharf-boat did not sink through any fault of her officers or crew, and that it was customary for boats in that trade to deposit freight on the wharf-boat designed for reshipment on smaller vessels, but the court refused to receive the evidence.

The principle involved in this case was settled by this court in *Little v. Semple*, 8 Mo. 99, in which it was decided that the privilege of reshipping does not discharge the boat from any liability not excepted in the contract; and though the right is secured of transshipping on another boat, the lia-

Menkens v. Blumenthal.

bility continues until the goods are safely delivered at the port of destination. The privilege of reshipment reserved in the contract is intended for the benefit of the carrier, and does not limit his liability; for if the goods are safely delivered, he will earn his freight whether they are carried in his own or another vessel; and his obligations are commensurate to the reward he contracted to receive. (*Whitesides v. Russell*, 8 Watts & Serg. 44; *Angel on Carriers*, sec. 227.) If the goods are lost on the vessel on which they reshipped by a peril excepted in the bill of lading and by reason of an accident which would excuse the carrier if the loss had occurred on his own boat, he will not be responsible if he has the privilege of transshipment; but he will be liable for any loss occurring on the boat on which the goods are reshipped if under like circumstances he would be liable had the loss occurred on his own boat. If the carrier, without the privilege reserved in the bill of lading, reships on another boat, on which the goods are lost even by an inevitable accident, he will be liable, unless the necessity to reship results from a disaster to the vessel; and with the privilege of reshipping he has no right to remove the cargo except from one boat to the other, and then his responsibility continues the same as though it had not been removed. Without the stipulation in this bill of lading of the right to reship it would not be pretended that the Michigan was authorized to deposit her cargo on the wharf-boat, and the right secured by the stipulation was limited to the simple act of transferring from one boat to another. The evidence was properly excluded, and, with the concurrence of the other judges, the judgment will be affirmed.

MENKENS, Appellant, v. BLUMENTHAL, Respondent.

1. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be

Menkens v. Blumenthal.

connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent.

2. A division line mistakenly located and agreed upon by adjoining proprietors will not be held binding and conclusive upon them if no injustice be done by disregarding it.
8. A deed conveyed all the interest of the grantor in his father's estate or lands "near St. Louis;" *held*, that it might be shown that the father possessed land nearer St. Louis, and more appropriately within the description of the deed of the son, than that sought to be comprised within it.

Appeal from St. Louis Land Court.

This case has heretofore been before the supreme court. (See 19 Mo. 496.) Plaintiff seeks to recover in this action a lot in the city of Carondelet, in block No. 53. The lot sought to be recovered is seventy-five feet front on Second street by one hundred and sixty feet in depth, and is a part of the south-east quarter of said block as surveyed, its northern line being the line of division between the north-east and the south-east quarters of said block. In support of his title the plaintiff introduced in evidence a confirmation certificate issued by recorder Hunt to Amable Guion or his legal representatives for lot in block 31 (now 53), 150 feet by 300, bounded north by Second street, east by Church street, south by balance of square, and west by Third street—a deed from eight heirs of A. Guion to V. Guion for the north-east and north-west quarters of block 53, as laid down on the plat of survey of the town of Carondelet—a deed from V. Guion to C. D. Drake for the same lot, with the same description—a deed from Drake to Wilson Primm for an undivided one-half of said lot—a deed from Drake to McDonald for one-half of said lot—a partition between Primm and McDonald's heirs; in this partition the eastern half (north-east quarter of the block) of the lot was assigned to Primm—a deed from Primm to plaintiff Menkens conveying a lot 150 feet square, French measure, bounded north by E street, east by Second street, south by the balance of the square, and west by McDonald's heirs—a deed from Antoine Guion (one of the eight heirs of Amable Guion) to Wilson

Primm, conveying all his interest in his father's estate and lands near St. Louis—a deed from Joseph Guion to W. Primm for all his interest in his father, Amable Guion's estate—a deed from Primm, dated October 21, 1854, to plaintiff, conveying the lot in dispute. The plaintiff then introduced evidence with a view to show that Amable Guion had cultivated and possessed this lot prior to December 20, 1803; that it was in possession of said Guion and his heirs up to 1839, when it was sold to Primm and Drake; that Primm took possession of the lot and held it until he sold it to plaintiff in 1851; that plaintiff took possession in 1851. Plaintiff also introduced evidence with reference to the running of a partition line by Primm and Josette Wilson, who claimed title under the Hunot confirmation. (See below opinion of the court.)

The defendant then showed a confirmation to Gabriel Hunot's legal representatives of a lot in block 53, 150 feet by 300 feet, bounded south by F street, and north by the balance of the square. The defendant claimed title under this confirmation. The United States survey of the confirmation to Hunot's legal representatives embraced the lot in controversy; it corresponded with the survey of block No. 53 by Eiler. Evidence was also adduced by defendant bearing upon the possession of the lot by Guion and his representatives; also a deed from Bartholomew Guion to Wilson Primm for a tract of land of fifty arpens situate near the water-works of the city of St. Louis.

The defendant offered in evidence a deed from defendant Blumenthal to W. Bernard conveying the northern part of the north-east quarter of block No. 54, which lies next south of block No. 53. The court rejected said deed as incompetent.

The following is the eighth instruction (given at the request of defendant) referred to in the opinion of the court: "8. To enable the plaintiff to recover on the ground of adverse possession for twenty years by himself and those through whom he claims against the defendant is possession under a

Menkens v. Blumenthal.

confirmation from the United States under act of Congress of June 13, 1812, it is necessary to make out proof of actual possession of the premises in dispute for twenty connected years of time unbroken. If the plaintiff, in order to make up such twenty years' unbroken time, has to connect his possession with that of another person, he can obtain the benefit of the possession of such other person only by having a written contract or conveyance of such person for the land in question; and even though the plaintiff may show such twenty years' possession of the premises in dispute by the heirs of Amable Guion when they conveyed to Vincent Guion, yet that will not avail him without such written transfer vesting in him, or entitling him to their interest in the land so possessed by them."

Numerous instructions were given to the jury; it is deemed unnecessary to set them forth.

The jury found for the defendant.

Whittelsey, for appellant.

I. The court erred in refusing to admit the deed from defendant to William Bernard. It tended to show that defendant recognized lines of the old possession and claim of Guion. The court also erred in admitting the deed of Bartholomew Guion to Primm. The court erred in refusing the first instruction asked by plaintiff. The land was confirmed to the legal representatives of Guion. Two of those heirs conveyed all their interest in their father's estate to Primm. Primm had then title under them to one-fourth; that he conveyed to plaintiff.

II. The defendant and those claiming under Josette Wilson are estopped to deny that the line surveyed and adopted by the parties was the dividing lines of the quarters of said block; the second instruction should have been given. (*Joyal v. Rippey*, 19 Mo. 660; *Taylor v. Zepp*, 14 Mo. 482; *Blair v. Smith*, 16 Mo. 273; *Rockwell v. Adams*, 7 Cow. 761; 7 Johns. 245; 17 Johns. 29; 12 Wend. 421.)

III. Successive possessions under the statute of limitations,

Menkens v. Blumenthal.

if passed by consent from one party to another, will make a continuous possession good under the statute, and the possessions need not be passed by writing to enable the possessor to avail himself of the statute. The eighth instruction is erroneous. Possessions may be tacked without deed. (13 Johns. 118; 1 Johns. Cas. 36; Cunningham v. Patton, 6 Barr, 126; Valentine v. Cooley, 1 Meigs, 613; 5 Barr, 126; Fanning v. Wilcox, 3 Day, 269; 7 S. & R. 173; Shannon v. Kinney, 1 A. K. Marsh. 3; 2 id. 620; Cook, 366; Napier v. Simpson, 1 Tenn. 448; Ludlow's heirs v. McBride, 3 Ham. 240; Jackson on Real Actions, 45; Porter v. Perkins, 5 Mass. 236; Allen v. Rivington, 2 Saund. 111; Crockett v. Morrison, 11 Mo. 3; Denn v. Barnard, Cowp. 597; Jackson v. Harder, 4 Johns. 202; 1 Tenn. 515.)

IV. The ninth instruction was erroneous. The admissions of a party in possession are evidence against himself and those claiming under him. Declarations as to a dividing line, as well as the acts of the parties, are evidence. (Adams v. Rockwell, 16 Wend. 285; Bradstreet v. Pratt, 17 Wend. 44; Blair v. Smith, 16 Mo. 272; Taylor v. Zepp, 14 Mo. 482; 19 Mo. 660.) The first, second, fourth, sixth and tenth instructions are also erroneous. (See Janis v. Gurno, 4 Mo. 458); also generally 2 Bl. Comm. 297, 312; 4 Kent Comm. 450; 10 Mo. 260; 7 Mo. 569; 19 Mo. 132; 20 Mo. 81.)

Dick, for respondent.

I. The court committed no error in refusing instructions. The only question of law in the case arises on the eighth instruction. Vincent Guion did not convey the land in dispute. There was no evidence that he ever was on the land in dispute. A deed or writing was necessary to constitute privity of estate. The instruction was proper. (21 Mo. 836; 7 S. & R. 173.) Joseph Guion having conveyed by deed, the eighth instruction could not apply to him. As a necessary consequence the verdict found that there had not been twenty years' possession in Amable Guion or his legal representatives.

NAPTON, Judge, delivered the opinion of the court.

In this case the plaintiff seeks to recover on a prior possession of twenty years against the defendant, who has an elder and perfect paper title. The decision made by this court, when the case was here before, (see 19 Mo. 496,) restricted the confirmation to Amable Guion, and the derivative title under that confirmation to the lot as embraced in the survey of Eiler; and no portion of the ground now in dispute lies within that survey of the Guion confirmation.

A possession, to be available under such circumstances, must be continuous and adverse, and so the instructions of the court upon the trial declared. The court further declared in the eighth instruction that the connexion between the possession of the plaintiff, or those under whom he claimed, and previous occupants, could only be shown by writing; and this instruction is in our opinion erroneous. The only question in cases of this nature is, whether there has been twenty years' continuous possession, and whether that possession has been adverse to the title. Deeds or instruments of writing are frequently resorted to as the most convincing proofs of the adverse character of the possession, and to show its continuity from one occupant to another where there has been more than one person in possession. But we do not understand that this is the only testimony which can be used for this purpose. Where a possession is broken up by abandonment and there is a succession of independent occupants, no title can be made out which will bar the real owner. But whether one occupant receives his possession from a prior one, or is a mere intruder upon an abandoned lot, is a question of fact which may be determined by any testimony which is legitimate and pertinent. We know of no rule of evidence which confines the proof to deeds or written instruments.

It is claimed that a division line agreed on between Josette Wilson, at the time she was proprietor of the Hunot lot, and Primm, who was the owner of the Guion lot, was conclusive

Menkens v. Blumenthal.

upon the defendant Blumenthal, who holds under Mrs. Wilson; and instructions were asked by the plaintiff to this effect. These instructions, we think, were properly refused. This line was, as subsequent events have shown, a mistake. The survey of the lots has changed this division line; but it has given to each party a full lot. What has been lost on one side has been gained on the other; and both parties have availed themselves of the gains, though neither seems disposed to submit to the losses. The main ground upon which such practical adoptions of boundaries have been held to estop, are wanting in this case. No injustice seems to be done to either party by holding each to the correct surveyed line. The mistake was common to both, and its correction, as far as can be seen, equally advantageous to both. Besides, the line adopted by Primm and Mrs. Wilson was intended as the boundary between the Guion and Hunot lot as they are understood to be held under their respective confirmations. It has thrown no light upon the present controversy except so far as it may show the extent of Primm's possession. The plaintiff's claim is not now upon the Guion confirmation, but upon possession merely.

The deed from Bartholomew Guion to Primm was properly admitted. The plaintiff had given in evidence a deed from Antoine Guion to Primm for his interest in his father's land "near St. Louis." This latter deed would not pass the land now in dispute, if it appeared that the father owned land in the vicinity of St. Louis, and the deed from Bartholomew shows that such lands were owned by Amable Guion "near the water-works of the city of St. Louis," which would fully answer the descriptive words of the deed from Antoine, without embracing the land now in dispute. To construe a deed for land "near St. Louis," as conveying a lot in the town of Carondelet, merely because the latter is distant not more than five or six miles from the former, would be a very liberal interpretation of a deed, and could only be authorized upon proof that the grantor had no land coming more nearly within the language of the deed.

Primm v. Haren.

The deed from Bartholomew to Bernard was properly excluded, as it did not appear that Blumenthal had any title to the land thereby conveyed.

Upon the whole case, we think the judgment of the circuit court was right, notwithstanding the error of the eighth instruction. The last instruction, given at the plaintiff's instance, told the jury that Primm was fully invested with the interest of Joseph Guion to the land in controversy by the deed from him which was in evidence, and consequently the plaintiff was entitled to recover under the eighth instruction to the extent of that interest, if the jury believed there had been a continuous adverse possession of twenty years. Their verdict must be understood as negating the fact of adverse possession—the basis upon which the suit is founded. The plaintiff was not prejudiced by the eighth instruction so far as one-eighth of the land is concerned; but the jury have found against him as to the whole. We do not perceive any benefit which the plaintiff could derive from another trial; and as we think the judgment is for the right party, although an error was committed, we shall affirm the judgment. The other judges concur.

PRIMM *et al.*, Appellants, v. HAREN, Respondent.

1. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation?
2. The United States survey of Carondelet common includes private claims; hence, it would be erroneous to rule that twenty years' claim and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812.
3. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto.
4. It is the province of the court to construe written instruments; where, however, they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted.

Appeal from St. Louis Land Court.

This was an action to recover possession of part of a tract of six by forty arpens, alleged to have been confirmed to J. B. Gamache, sr., or his legal representatives, by act of Congress of June 13, 1812. The land sought to be recovered lies within the United States survey of Carondelet common. Defendant claims title under the confirmation of the common of Carondelet. The titles are the same in general as in the case of Gamache v. Piquinot, 17 Mo. 315.

The court, at the request of plaintiffs, gave the following instructions: "1. The jury are instructed that inhabitation, cultivation or possession of a part of a lot, claiming the whole, is in law a cultivation or possession of the whole lot claimed, within the intent and meaning of the act of Congress of 13th of June, 1812. 2. If the jury believe from the evidence that John B. Gamache, sr., was an inhabitant of the village of Carondelet prior to the 20th December, 1803; that he claimed, cultivated and possessed the tract of land in the petition mentioned, as an out-lot or cultivated field lot, adjoining or belonging to said village, they will find for the plaintiff for one-fourth of the portion of said tract they shall find to have been in defendant's possession at the commencement of this suit." The court refused the following instruction asked by plaintiffs: "3. The jury are instructed that the defendant has given no such evidence of adverse possession of the land in controversy in this case for more than twenty years prior to the commencement of this suit as is sufficient in law to constitute an adverse possession that can bar this suit." To which refusal plaintiff excepted.

The court gave, at the request of defendants, the following instructions: "1. If the jury find that the land in controversy was claimed and used, under Spanish authority, by the inhabitants of Carondelet, as part of their common prior and up to the 20th day of December, 1803, and continued to be so used and claimed afterwards until the year 1813, and is in fact embraced by the survey of such common made by the authority of the United States as a part of such common, then

Primm v. Haren.

the plaintiff can not recover, and the jury ought to render a verdict for the defendant. 2. If the jury believe that Gamache, without any claim as proprietor, cultivated a patch of ground within the limits of the common of Carondelet, as claimed and used in Spanish times and as surveyed by the authority of the United States, he did not by the fact of such cultivation acquire a title to such ground as against the inhabitants of Carondelet. 3. If the jury find that Gamache presented a petition to the Spanish governor, asking for a grant for cultivation of a tract whereof the land in controversy is a part, and such petition was denied on the ground that the land asked for was reserved for commons, then such denial of the petition is evidence tending to show that a subsequent cultivation of a small part of the same tract by Gamache was had without any rightful claim thereto as proprietor. 4. If the jury find that Gamache, prior to 1803, possessed or cultivated a piece of ground south of the common fields of Carondelet, still he did not thereby acquire any title that can avail in the present action, unless the jury are able to determine from the evidence with reasonable certainty the location of the piece of ground so cultivated or possessed. 5. If the jury find that a survey of the large tract of land called the Carondelet commons, embracing the land in controversy, was made by Rector, under the authority of the United States, and that the corners and lines of such survey were marked by visible monuments on the ground as early as the year 1817, and that the inhabitants of the town of Carondelet from that time forward claimed the land embraced in such survey as their commons, and for more than twenty years next succeeding the 17th day of December, 1818, and up to this suit actually used the said land as commons, by felling timber and making hay thereon, and claiming the same up to the lines of said survey, and prosecuting persons for trespass thereon; the plaintiffs are thereby barred of their rights to recover in this action, and the jury will find for the defendant. 6. The act of 13th June, 1812, and the official survey read in evidence, known as Brown's survey,

constitute a title in the inhabitants of Carondelet to the land embraced in the survey as effectual as a patent."

The jury found a verdict for defendant.

Whittelsey, for appellants.

I. The certificate of confirmation issued by Conway was illegal. The act of 1824 did not authorize the recorder to take proof of common. (*Dent v. Bingham*, 8 Mo. 579.) Hunt issued no certificate, and Conway had no power so to do in 1834. (*Gamache v. Piquinot*, 17 Mo. 310; 16 How. 471.)

II. The hearsay testimony of old inhabitants was not legal evidence to prove title to common. (1 Greenl. Ev. 175; 1 Stark on Ev. 2733.)

III. The plaintiffs were not barred by the statute of limitations, for there had been no actual, visible or adverse possession of the premises until 1843. Carondelet was not incorporated until August 20, 1832; consequently, no prescription could run for her, as none could run against her, before that date. (*Reilly v. Chouquette*, 18 Mo. 220.) The acts of individual inhabitants in cutting wood did not constitute an actual, or visible or continuous possession. (*Harrison v. Cachelin*, 23 Mo. 624; *Menkens v. Ovenhouse*, 22 Mo. 70; *Cutter v. Waddingham*, 22 Mo. 206.) The survey of Rector does not appear to have been approved until 1855. The court erred, therefore, in refusing plaintiffs' third and in giving defendants' fifth instruction. User does not give title to common. It must rest upon the grant of the sovereign authority.

IV. There was no legal testimony to warrant the third instruction given at the request of defendants. The papers filed with the board were not evidence as against Gamache and those claiming under him. His signature was not proven. The petition of the inhabitants asked for an extension of their lands or common fields below the Des Peres, and they take for limit the land of Constant, which was at the Des Peres. The petition and answer only applied to

Primm v. Haren.

lands below the Des Peres, and did not embrace the land sued for. Historically we know that the common field reached down to the Des Peres. (Mackay v. Dillon, 4 How. —.) The land was not reserved for common by Trudeau, but to furnish wood, and that was not a grant of common. The third instruction is also erroneous for the reason that it leaves to the jury the construction of the petition.

L. G. Picot, for respondent, cited Angell on Lim. 410; 414; Gamache v. Piquinot, 17 Mo. 315; Le Bois v. Brammell, 4 How. 464.

Scott, Judge, delivered the opinion of the court.

The statute of limitations is made the turning point of this cause as it is presented by the record. We can not well see how Carondelet can claim commons under the statute or limitations, especially on a possession from the 17th March, 1818. It has been thought for some time that the statute of limitations did not operate against the town until the time of her incorporation, which took place in August, 1832. If she could not sue for the want of an incorporation, it is not obvious how she could have been sued without one. It may be if one had gone into possession under her, he might have been turned out by an ejectment brought by one holding a better title than that under which the tenant claimed. But this does not seem important, as Carondelet, from the date of her incorporation, made claim to her commons more than twenty years before the institution of this suit. Its effect would be only to vary the terms of the instruction. How were the commons surveyed as appears from the plat of the survey? The survey included the entire village and the private claims within its boundaries. If the instruction given at the instance of defendant is correct, then may not the village, under the statute of limitations, acquire title to all the unoccupied land within the survey by whatever title it may be held. There were valid private claims within the survey beyond all question. Would the acts supposed in the

fifth instruction give a title against those claims on the ground of an adverse possession in Carondelet for twenty years? A claim for commons within the boundaries of a survey is not inconsistent with the idea of private claims existing within its limits. Then the fact is known that a claim to commons is not necessarily hostile to private claims within its limits. How then were the facts set forth in the instruction notice to any one, who had a private claim within the outboundaries of the survey, of the assertion of a hostile right? Would it not be strange if Carondelet, putting a tenant in possession of a village lot to which she had no claim otherwise, should be permitted to defeat the owner's action for the recovery of the possession of it, by proving Brown's survey and introducing a witness who would show that the plaintiff knew Rector's corners; that Carondelet always claimed commons, and that individuals below the Barracks had cut timber and made hay? The instruction given does not confine the acts of ownership exercised by Carondelet to the lot in controversy, but would deprive the owner of a lot in the village under the statute of limitations because individuals were seen felling trees or making hay two or three miles below. The instruction given relieves us from the task of examining the evidence in relation to the acts of ownership exercised by Carondelet over her commons, because it states the facts which will be sufficient to constitute an adverse possession in the opinion of the defendant.

The certificate of confirmation issued by Recorder Conway was not properly evidence in the cause. The recorder of land titles, under the act of 26th May, 1824, had no authority to take any proof in relation to the extent or boundary of the commons, or of their use or occupation; consequently his certificate could not be evidence of title.

As there was no attempt to establish a right to commons by parol evidence as a ground of defence, the plaintiff could not have been affected by evidence to that effect.

The first instruction given for the defendant did not place the claim to commons on user, but on the confirmation and survey, and no objection was made to those documents.

Missouri Institute for the Education of the Blind v. How.

The third instruction is not obnoxious to the objections urged against it. The jury were the proper judges of the inferences of fact to be drawn from the papers. The legal effect of papers is to be determined by the court, but when documents are offered in evidence as the foundation of an inference of fact, whether such inference can be drawn from them is a question for the jury. The most authentic documents, when offered for such a purpose, become no more than mere letters or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury. When documents are offered for such a purpose, they, like a written correspondence, may be explained by extrinsic evidence. The petition of Gamache, whether on behalf of himself or the inhabitants of the village, being made the foundation of an official act, it, together with the act, was evidence for the jury, to have such weight as, under all the circumstances, they might deem it entitled to.

The judgment is reversed and the cause remanded; the other judges concurring.

MISSOURI INSTITUTE FOR THE EDUCATION OF THE BLIND, Respondent, v. How *et al.*, Appellants.

1. A clear intention to dedicate is necessary to constitute a dedication of land to the public.
2. To authorize the presumption of an intention to dedicate land to the public as a street, there must be either an acquiescence by the owner for twenty years in the free use and enjoyment of such land as a public street, or such clear, unequivocal and decisive acts as will amount to an explicit manifestation of his will to make a permanent abandonment and dedication thereof to the public.

Appeal from St. Louis Land Court.

This was an action in the nature of an action of trespass *quære clausum fregit*, instituted September 26, 1856, to recover damages for an alleged wrongful entry upon certain

premises described as block No. 3 in N. P. Taylor's addition to St. Louis. The defendants, in their answer, pleaded, substantially, not guilty; that plaintiff had no property in the *locus in quo*; and that the premises were a part of a public street, dedicated to public use prior to the alleged trespass by plaintiff and those under whom he claims. The gist of the defence is that the public had a right of way over the premises.

The premises in controversy formerly belonged to William Christy. N. P. Taylor acquired title under said Christy in 1837. In the deed of said Christy the land conveyed was described as lot No. 29 in the "plan of apportionment" of his property among his children. Taylor subdivided said lot No. 29 into lots, and it formed part of "N. P. Taylor's addition to St. Louis." The said lot 29 was designated as block No. 3 in the plat of said partition. In 1838 Taylor conveyed said block to Ruland. Ruland dying in 1850, the title passed to his heirs, under whom the plaintiff acquired title through various mesne conveyances in the year 1854. When Ruland purchased in the year 1838, he took possession and made enclosures, but did not enclose the portion (about 25 feet) on the west side of the block, which is the subject of controversy in this suit. During the same year, Ruland employed Cozzens (a surveyor) to survey the property in order to ascertain its true location. Cozzens made the survey, and informed Ruland that his lot (block 3) extended about 24½ feet further west than he (Ruland) had supposed or had enclosed. Ruland, however, thought he had enclosed the ground he had purchased from Taylor, but said he was entitled to 218 feet on Morgan street through to Franklin avenue. He insisted that he was entitled to 218 feet, and said that if any one claimed of him on the east, he should claim his quantity on the west. The same surveyor surveyed the premises again in 1846, with the same result. At the time Taylor laid out his addition, and up to the year 1856, the premises were without the limits of the city of St. Louis. At the time of the alleged trespass they were within said limits.

After the plaintiff acquired title, in the years 1855 and 1856, the plaintiff put up a new fence enclosing about 24 feet on the west that had not been previously enclosed. It is upon this piece of land that the defendants, How and Ruggles, entered, and removed this fence. Said How was, at the time, mayor of the city of St. Louis. Ruggles acted under and by orders of said mayor.

The deeds constituting plaintiffs' chain of title (executed by various parties since the death of Ruland) describe the property substantially alike, viz: As lots 1 to 14 inclusive, in block No. 3, in N. P. Taylor's addition, fronting 218 feet on Morgan street, extending to Franklin avenue, bounded north by Franklin avenue, east by Swearingen, south by Morgan street, and *west by Twentieth, sometimes called Nineteenth street*. When division was made among the children of Christy and when Taylor acquired title to lot 29 in 1837, there was no street named or known on the west side of said lot, nor did Taylor, in making or platting his addition, name or recognize any street on the west of his addition. There was evidence tending to show that there was a street thirty feet wide on the west side of said block No. 3. There was some evidence tending to show that the public had used the *locus in quo* as a public street or thoroughfare. The evidence on this point was conflicting.

The court, at the instance of plaintiff, gave the following instructions: "1. Unless the jury find from the evidence that the present or former proprietor of the premises in question did some affirmative act showing an intention to dedicate the same to public use as a highway, then the said premises have not become a highway, and the public have not acquired the right of way over the same. 2. Although the jury may find from the evidence that the defendant John How, at the time of the alleged trespass, was mayor of the city of St. Louis, and acted in his official capacity as such mayor in all that he did in respect to entering the premises in question; and although his co-defendant, in all that he did in respect to said premises, acted under and in obedience to

Missouri Institute for the Education of the Blind v. How.

the orders and directions of said mayor, yet they are liable to this action if the plaintiff was in possession and the defendants entered upon said premises against the consent of the plaintiff and tore down and removed the fence, unless there was at the time of the alleged entry a public road, street or public way over said premises; and the burthen of showing that there was such a public road, street or public way rests on the defendants."

At the instance of the defendants, the court gave the following: "3. That if the fence erected by the plaintiff was located in a public street, then the defendant, John How, as mayor of the city, had a right to cause the same to be removed. 4. That if the jury believe from the evidence that General Ruland, or those who claim under him, dedicated the land, upon which plaintiff erected the fence, to the public use, they will find for the defendants. 5. That no particular form is necessary in the dedication of land to the public use; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the persons so dedicating it. 6. That to determine whether or not Ruland, or any person claiming under him, ever assented to the dedication of Nineteenth alias Twentieth street to the public use, the jury have a right to take into consideration all the facts and circumstances of the case in proof. 7. In order to constitute trespass by the defendants, it is necessary that the plaintiffs show themselves in possession of the land west of the original fence made by Ruland; and if the plaintiffs have failed to show title to the ground or possession of the ground west of the original fence, they will find for the defendants."

Defendants asked the following instructions, which were refused: "1. If the jury believe from the evidence that Gen. Ruland caused lot No. 29 to be surveyed and directed the surveyor to commence in the centre of Twelfth street and run west, and caused the ground to be enclosed so as to embrace all he claimed of said lot, and that the fence removed by the authorities was outside of such survey and in a street

called and known as Twentieth, alias Nineteenth street, they will find for defendant. 2. If the jury believe from the evidence that the street in controversy was used by the public with the assent of General Ruland, and that the deed from Ruland's heirs to Greene's trustees, and from Greene's trustees to Greene, and the deed from Greene to Morrison, and from Morrison to plaintiff, calls for Twentieth alias Nineteenth street as a western boundary, then they are estopped and precluded from asserting any ownership to the ground, on which plaintiff erected the fence, inconsistent with the right of the public to use the same. 3. That if the jury believe from the evidence that General Ruland permitted the ground lying west of the west fence to be used by the public as a street or highway, and that the same has been since used as a public street or highway up to the time that the plaintiff erected a fence thereon, then it is such a dedication of the said ground to the public as to preclude the plaintiff from recovering in this action. 4. If the jury believe from the evidence that the ground on which the plaintiff erected a fence, the removal of which is alleged as a trespass, was used as a public highway, and had been previously used by the public as a street, and that the plaintiff erected a fence thereon, and that plaintiff had no possession of said ground until the erection of said fence, and that the city authorities immediately after the erection of said fence caused the same to be removed, then the possession of the plaintiff was not such a possession as will entitle them to recover in this action."

The jury found for the plaintiff.

Bay, for appellants.

I. The court erred in giving the first instruction in behalf of plaintiff. No particular form is required in dedicating a street or highway to the public use. A mere acquiescence in the use of the land by the public is sufficient to authorize a jury to presume a dedication. (Angell on Highways,

Missouri Institute for the Education of the Blind v. How.

113; Gould v. Glass, 19 Barb. 195; Regina v. Petrie, 30 Eng. Law & Eq. R. 207; Jarvis v. Dean, 3 Bing. 417; Pritchard v. Atkinson, 4 N. H. 1; 11 East. 375; 6 Peters, 440.) The court also erred in refusing the instructions asked by the defendants.

Krum & Harding, for respondent.

Scott, Judge, delivered the opinion of the court.

The defendants have failed to establish any justification for the trespass with which they are charged. Their defence rested on the ground that there had been a dedication of the land to the public as a street.

The vital principle of a dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. (Angell on Highways, 113.) When the proprietor of town property lays it out into lots, with streets and alleys intersecting it, and sells lots with reference to the plat in which the same is so laid off, he thereby dedicates the streets and alleys to the public. There is some contrariety of opinion as to the length of time the owner must acquiesce in the use of his property by the public before it can be said that he has made a dedication of it. In relation to this matter Chancellor Kent says, "If there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence on the part of the owner in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required as being the usual and analogous period of limitation. But if there were clear, unequivocal and decisive acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment and dedication of the land, those would be sufficient to establish the dedication within any intermediate period, and without any deed or other writing." (3 Kent Comm. 451.)

Missouri Institute for the Education of the Blind v. How.

Angell, on the same subject, says, "In a recent American case, it was held that, without some clear and unequivocal manifestation of an intention to dedicate, dedication would not be presumed until after the lapse of twenty years; and this seems to be the view more generally taken by the American courts." (Angell on Highways, 116.)

The lot in controversy, it seems, was not made a part of the city until some time in 1856. It is not pretended that Ruland was a founder of cities, dedicating streets, alleys and public places with a view of enhancing the value of the rest of his property or to induce purchasers to buy. He owned but a single lot, measuring 218 feet on two streets, and of the depth of the block separating them. He had just purchased it. The land on his west was vacant and unenclosed. He had no need of an outlet. Such being the circumstances, more direct and positive evidence of facts manifesting an intention to dedicate are necessary. Strong evidence should be required to raise a presumption that the owner of a lot just purchased would abandon to the public more than one-ninth of it, when at the time there was no necessity for, nor policy in, such act. It would have been time to make the dedication when the relative situation of his lot required such an act for his own convenience. Ruland may have pointed out Nineteenth alias Twentieth street to Moulton. But, while doing this, he was claiming that the eastern boundary of his lot should be so projected, and it was in fact so projected, as to leave uncovered by his claim the ground now in controversy. A presumption is not easily indulged that a proprietor has abandoned that of which he is not aware that he is the owner. The idea of a dedication by Ruland is inconsistent with the testimony of Cozzens, a witness introduced by the defendant himself. The witness says Ruland always claimed 218 feet, the quantity he purchased. He told Ruland his eastern fence was not properly located. Ruland insisted that it was, and asserted that if he lost the ground on the east he would have his quantity on

the west. Ruland, while claiming on the east, could with no propriety assert any right to any unfenced land on the west; for the quantity to which he was entitled being definite, such a presumption would have weakened, if not destroyed, his claim on the east. If a proprietor is mistaken as to the location of his lot, and leaves a portion of it unenclosed, supposing that it is not covered by his claim, and afterwards ascertains his error, it would be hard in such a case to presume a dedication. In the case of *Barraclough v. Johnson*, 8 Ad. & Ellis, 99, Lord Denman said, "A dedication must be made with an intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction."

There is nothing in the record that warrants the supposition, nor is such a view of the case presented by any of the instructions, that Ruland really intended to give a street on the west, and only claimed on the east in the hope of obtaining an indemnity for what he had determined to relinquish for his own convenience on the west.

If we take the entire description of the lot as contained in the several deeds under which the plaintiff claims, we will find that it furnishes no evidence in support of the pretensions of the defendant. On the contrary, it shows that there was no intention on the part of the several grantors in those deeds to relinquish any part of the lot. The circumstances relied on to show an intent to dedicate is the call for a street on the west in the deeds. But that call does not show that it was the intention that the street should be opened by laying it out on a portion of the lot. The contrary is clearly manifest. All the deeds refer to a plan on record. That plan shows that Ruland's lot fronted 218 feet on Morgan street, and the same number on Franklin avenue. The space between these streets was divided by an alley, thus forming two lots, one fronting on Morgan street and the other on Franklin avenue. These two lots, having a front

each of two hundred and eighteen feet, were severally subdivided into seven smaller lots—one with a front of 32 feet, and the rest with 31 feet each—making the aggregate 218 feet. By laying out the street on the lot, two of these smaller lots would be reduced into narrow slips not exceeding five or six feet in front. But it appears from the evidence that at the date of the deeds referred to, (for they were made after the death of Ruland,) there was a street west of the ground and adjoining it. This street was laid out by the commissioners appointed to make partition among the heirs of Wm. Christy, to whom the unenclosed land on the west belonged. The street laid out according to the plat was only 30 feet, but still it was sufficient to answer the call.

According to the principles stated in this opinion as derived from able commentators on our laws, it will not be necessary for us to determine whether acquiescence is a negative or affirmative act. The time relied on as raising a presumption of dedication from user is far short of twenty years, and there is no other circumstance in the case from which it would be warrantable to declare that there was a dedication within that period. There was no error in the first instruction given for the plaintiff, and there could have been but little cause of complaint had the law been as the defendant supposed when the instructions given on his behalf are considered in connexion with it. Notwithstanding the case of *Regina v. Petrie*, 30 Eng. Law & Eq. R. 217, Angell states the American law to be as it has been assumed in this opinion.

In the refusal to give the rejected instructions asked by the defendant, there is no error. The judgment is affirmed; the other judges concur.

Watson v. Bissell.

WATSON et al., Respondents, v. BISSELL, Appellant.

1. Where the possession of land by a party in whose favor it is sought to invoke the presumption of a deed is entirely consistent with title in another—as where a father (in whose behalf the presumption is invoked as against his son and the son's heirs) is in possession of land during the minority of the son, or after the death of the son, at which time the law devolved a life interest in the land of the son upon the father—such possession will not authorize the presumption of a conveyance.
2. Declarations of a person in possession of land as a life tenant can not be received in evidence to elevate his life estate into an estate in fee.

Appeal from St. Louis Land Court.

This was an action to recover possession of three fifty-fifths of a tract of land confirmed to Leon N. St. Cyr. There was a recovery had as to one fifty-fifth of said tract of land in behalf of Virginia Christy, one of the plaintiffs. The other plaintiffs were cut off by the rulings of the court on the statute of limitations. With respect to said Virginia, it was admitted that if she was entitled to recover she was entitled to recover one fifty-fifth part. It appeared that Virginia Christy was a daughter of Israel Reed Christy, who was a son of William Christy, who died in 1839; that said William and his wife Constance had five children including said Israel, all of whom survived their mother, who died in 1822 or 1823; that said Virginia was the only surviving child of said Israel, and was ten years old at the time of the trial. Said Constance, the mother of Israel, was the daughter of Hyacynth St. Cyr, who had twelve children, one of whom was Leon N. St. Cyr, who was born in 1787, and who about the year 1809 went away and was never heard of again, and was supposed to have been drowned in the Mississippi river. The father and mother of said Leon N. St. Cyr died in 1826. Israel Reed Christy was born in 1816 and died in 1851. Constance, wife of William Christy, was born in November, 1785, and was married in 1807. The land sought to be recovered was confirmed to said Leon N. St. Cyr. It appeared in evidence that Hyacynth St. Cyr was in possession of this

Watson v. Bissell.

land from about 1800 or 1802 until 1817, when he conveyed the same to Joseph Brazeau, from whom defendant has a regular chain of title. The defendant offered to prove that Hyacynth St. Cyr (the father) claimed the land in question as his own and publicly declared that it belonged to him from 1802 to 1817, when he sold to Brazeau. The court excluded this testimony.

It is deemed unnecessary to set forth the instructions given and refused. The court refused to give certain instructions asked by defendant authorizing the jury to presume title in Hyacynth St. Cyr at the date of the deed to Brazeau.

Krum & Harding, for appellant.

I. A state of facts was shown in evidence from which a deed to or title in fee in Hyacynth St. Cyr might have been presumed by the jury. The instructions based hypothetically on these facts should have been given. (16 Pick. 137; 17 id. 255; 1 Harr. & Jo. 527; Dessaunier v. Murphy, 22 Mo. 95; 2 Swan, 27, 109; 7 Rich., S. C., 353; 13 Ired. 262; 2 Strobb. 141; 2 Rich. 19; 7 Ired. 135; 1 Turn. & Rus. 107; 2 Taunt. 156; 5 J. J. Marsh. 545; 3 Johns. Ch. 129; 20 Ohio, 231; 3 Strobb. 598, 501; 9 Yerg. 455; 5 Dev. & Bat. 407.)

II. The evidence excluded was competent.

Breckinridge & Page, for respondent.

I. The instruction given stated the law properly to the jury. (Geyer's Dig. 474, 478; 2 Am. State Papers, 455-6; 2 id. 298, 8 Mo. 528; Hogan v. Page, 22 Mo. 63; Mercier v. Letcher, 22 Mo. 66; Berthold v. McDonald, 24 Mo. 133; 15 Mo. 87; 1 Terr. Laws, p. 129, 401; 5 Humph. 117; 1 R. C. 1855, p. 692; R. C. 1825, tit. Limitations, § 2 & 3.)

II. This was no case for the presumption of a deed. The instructions asked by defendant were properly refused. They asked the court to advise the jury to presume a deed from acts of ownership by a father over the property of a minor son in the first place, and afterwards by a life-tenant and his

Watson v. Bissell.

grantee. The facts from which such presumption is asked to be drawn are perfectly consistent with plaintiff's title. (1 Greenl. Ev. § 46, 17; 1 Phil. Ev. 161-2; 1 Cow. & Hill's Notes, 356, 365; Dessanier v. Murphy, 22 Mo. 105; Cowp. 214; Sumner v. Child, 2 Conn. 615; 19 Mo. 360.) The other instructions were properly refused.

III. The court properly excluded the declarations of Hyacynth St. Cyr. (9 Mo. 797; 21 Mo. 522; 16 Mo. 242.)

NAPTON, Judge, delivered the opinion of the court.

We can not perceive any thing in the circumstances of this case which would warrant a court or jury in presuming a deed from Leon N. St. Cyr to the father Hyacynth St. Cyr. On the contrary, such a presumption would neither consist with the facts proved or admitted relative to possession, or with the deed from the elder St. Cyr to Brazeau. The acts of ownership exercised by Hyacynth St. Cyr during the life and minority of his son, and whilst his son lived with him, are entirely consistent with the title of the son, and the possession and ownership after the death of Leon in 1809 were also consistent with his own title. He had a life estate in the land. The deed to Brazeau in 1817 is totally inconsistent with the existence of a conveyance from Leon to Hyacynth previous to 1809, since the deed itself refers to no such conveyance, and the title conveyed is not pretended to have been derived in that way, but by the death of Leon without issue in 1809. As this deed to Brazeau was a conveyance under the statute of uses, which could only convey such title as the grantor had, it did not create a forfeiture of the life estate. (Cruise Dig. —.) Consequently, until the death of Hyacynth St. Cyr in 1826, there was no possession adverse to the rights of the brothers and sisters of Leon St. Cyr, whose title never accrued until that time. If then coverture or infancy or other disability prevented the running of the statute of limitations, as the jury under the instructions have found, the plaintiff was entitled to recover.

Watson v. Bissell.

In our examination of the doctrine of presuming deeds we have not observed any case in which a court would permit a deed to be presumed where the ancient possession proved was entirely consistent with the title papers in evidence, and the adverse possession had not run long enough to bar it. (Waggoner v. Waggoner, 4 Mon. 547.)

The evidence offered by the defendants of declarations of Hyacynth St. Cyr, whilst in possession, intended to elevate his life estate into a fee simple, were properly rejected. (Belden v. Turner, 9 Mo. 797.)

The instructions on the subject of proving the ouster were also properly refused. (Peterson v. Laik, 24 Mo. 641.) The judgment is affirmed.

[END OF MARCH TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
JULY TERM, 1858, AT JEFFERSON CITY.

MORSE, Respondent, v. BROWNFIELD, Appellant.

1. The technical rules of practice are not applicable to proceedings before justices of the peace.
2. Where in the trial, before a justice of the peace, of an issue raised by an interplea in an attachment suit, the justice entered on his docket the verdict of the jury but omitted to render judgment on it, and the interpleader appealed to the circuit court, where the appeal was dismissed for want of a judgment by the justice; *held*, that such dismissal was improper.

Appeal from Pulaski Circuit Court.

Mitchell & Wingo, for appellant, cited *Franse v. Owens*, 25 Mo. 329; *Rutherford v. Wimer*, 3 Mo. 12.

RICHARDSON, Judge, delivered the opinion of the court.

The history of this controversy is so briefly narrated in the record that it is impossible to see its real merits. It appears however that it is a suit by attachment commenced before a justice of the peace, and that the main issue was made by

Williams v. The Judge of the Cooper Court of Common Pleas.

the interplea of Brownfield, who claimed the property in the hands of the garnishee. The issue was tried by a jury, who found against the claim, and thereupon the interpleader appealed to the circuit court. The verdict was entered by the justice on his docket, but he omitted to render judgment on it, and for that reason the appeal was dismissed.

It would be unwise and unsafe to apply technical rules to proceedings in justices' courts, and therefore forms are disregarded when it can be seen that the law has been substantially observed.

A justice of the peace is required to enter the verdict of a jury on his docket and to render judgment accordingly; and, having no control over verdicts and no discretion to exercise on the subject, the duty of giving judgment on a verdict is peremptory and ministerial in its character. It has therefore been decided that the effect of a formal judgment ought to be given to a verdict as soon as it is entered on a justice's docket. (*Rutherford v. Wimer*, 3 Mo. 12; *Franse v. Owens*, 25 Mo. 329.)

The other judges concurring, the judgment will be reversed and the cause remanded.



WILLIAMS & WYAN v. THE JUDGE OF THE COOPER COURT OF
COMMON PLEAS.

1. A mandamus, as a general rule, will not issue unless the party asking it has a clear right and no other specific legal remedy; it will not be granted to bring under review the proceedings of an inferior court on the ground of error, and therefore it will be refused in a case in which a writ of error will lie, or where the party can be redressed by appeal.

Stephens & Vest, for petitioners.

I. The court properly assessed the damages and rendered judgment at the first term. (20 Mo. 96; R. C. 1855, p. 356, 1222; 24 Mo. 27; 6 J. J. Marsh. 354; 4 Monr. 415; 1 B. Mon. 150; 22 Mo. 433; 6 How. Pract. R. 326.)

Williams v. The Judge of the Cooper Court of Common Pleas.

II. The attorneys who filed the motion, in the name of defendant, to set aside the judgment and quash the execution, had no right to appear for the defendant or to make any such motion. (Keith v. Wilson, 6 Mo. 435 ; 3 Monr. 190.)

RICHARDSON, Judge, delivered the opinion of the court.

Williams and Wyan filed their petition in the Cooper court of common pleas, on an open account for lumber sold and delivered, against the Central Agricultural Society, which is a corporation, but the summons was issued against N. G. Elliott and Wm. H. Trigg. At the return term of the writ an entry appears in these words: "The defendant, by N. G. Elliott, the president of said society, now here enters its appearance and waives its right to a continuance."

Afterwards, during the same term, the record shows that the parties came, and by consent submitted the case to the court; whereupon the damages were assessed without a jury, and final judgment rendered, for the amount claimed in the petition. On this judgment an execution was issued, and at the return term thereof, in January, the defendant appeared by attorney, and on its motion, after notice to the plaintiffs, the court quashed the execution and set aside the judgment rendered at the previous November term. To this decision the plaintiffs excepted and filed their motion for an *alias* execution, which was denied, and they now apply for a *mandamus* to compel the court to issue another execution.

The writ in this case was void because it was not issued against the defendant; but as the president was the proper officer on whom to serve any process against the defendant, (1 R. C. 1855, p. 376,) his appearance in court on behalf of the society was sufficient to give the court jurisdiction of the parties and the cause. (Chamberlin v. Mammoth Mining Co. 20 Mo. 96.)

Any irregularity in giving final judgment at the return term was cured by the mutual consent of the parties; (Boernstein v. Heinrichs, 24 Mo. 27;) and, conceding that it

Martin v. Martin's Adm'r.

was improper to assess the damages before a default had been taken, the judgment was not void for that reason. During the term at which the judgment was rendered the power existed to modify or vacate it, as the record remained in the breast of the court; but as the judgment was not void, and at most was only erroneous, we think that the court improperly set it aside. (Ashby v. Glasgow, 7 Mo. 320; Hill v. City of St. Louis, 20 Mo. 584.) The effect of the order made at the January term quashing the execution and vacating the judgment of the previous term was to dismiss the suit, and it therefore operated as a final judgment, on which a writ of error will lie. It is a general rule that a *mandamus* will not issue unless the party asking it has a clear right and no other specific legal remedy. It will not be granted to bring under review the proceedings of an inferior court on the ground of error, and therefore it will be refused in a case in which a writ of error will lie, or where the party can be redressed by appeal. (6 Bacon's Abr. tit. *Mandamus*, C.; Hoyt *ex parte* 13 Pet. 279; Nelson *ex parte*, 1 Cow. 417; People v. Judges of Dutchess, 20 Wend. 658; Gordon *ex parte*, 2 Hill, 363; The Councils of Reading v. Commonwealth, 11 Penn. 196; James v. Comm'rs of Bucks Co. 13 Penn. 72; Marshall v. State, 1 Smith, 17.)

The petition will be overruled. The other judges concur.

MARTIN, Respondent, v. MARTIN'S ADMINISTRATOR, *et al.*,
Appellants.

1. A finding of the facts made by a court in a suit instituted since the revised code of 1855 went into effect, being unauthorized by law, forms no part of the record of the cause and can not be referred to in the supreme court for any purpose.
2. Amendments should be liberally allowed in furtherance of justice.

Appeal from Platte Circuit Court.

Spratt & Merryman, for appellants.

- I. The court erred in not permitting defendants to amend

Martin v. Martin's Adm'r.

their pleading so as to include the sum of sixty dollars proven to have been paid on said notes.

Ewing, for respondent.

I. The court had no right to allow the amendment. It was proposed after the evidence was closed, and changed the defence in matter of substance. (2 R. C. 1855, p. 1855, sec. 3.) But had it been such an amendment as the court in its discretion could have permitted, the refusal to do so would not be interfered with by this court. Amendments are peculiarly within the discretion of the inferior courts. (16 Mo. 226; 21 Mo. 535; 23 Mo. 227.)

RICHARDSON, Judge, delivered the opinion of the court.

The practice of finding the facts in cases tried by the court without the intervention of a jury no longer obtains, and such cases, in which instructions are neither asked nor given, will not be reviewed in this court except on questions of law duly saved during the progress of a trial; and the finding of facts by the court can not be referred to for any legitimate purpose, as it has not properly any place under the present law in the record. A case then submitted to the court without a jury must be treated in all respects as if it had been tried by a jury, and this court will not interfere except for such errors as will authorize the reversal of a judgment on the verdict of a jury. This point has been so often decided that it is too well settled to be discussed.

This case was submitted to the court without instructions, and only two questions are presented in the record, which are, first, the refusal to permit the defendants to amend their answer, and, secondly, the overruling of the motion for a new trial. In regard to the latter, it is sufficient to say that the evidence is not of such a preponderating character as to warrant the conclusion that it did not support the judgment; but as to the other exception, we think it was well taken.

The object of the suit was to foreclose a mortgage given to secure two promissory notes. The mortgagors sold the

property after the execution of the mortgage, and their vendees were made defendants, who set up in their answer several payments that had been made on the notes. The plaintiff's agent, on his examination as a witness, not only proved the payment, on the plaintiffs' account, of one hundred and seventy-five dollars to Wilcox, as a credit on the notes, which was set up in the answer and denied by the plaintiff, but he also proved the additional payment of sixty dollars which had been received as a credit on the mortgaged debt; thereupon, when this fact was disclosed on the trial the defendants asked leave to amend their answer so as to include this sum, but the court refused to allow the amendment.

The purchasers of the mortgaged premises having acquired the property subject to a lien, were directly interested in reducing the amount of the incumbrance, and they had the right to have any payments applied to its extinguishment which had been made on account of it. They were not presumed to know all the payments that had been made by the mortgagors, and they had no motive to suppress, until the trial, the knowledge of any payments that belonged to the debt; and as the credits to which the debt was entitled could not properly be claimed as set-offs, but were only available in a defence as payments, the effect of refusing the amendment was practically a gratuity of sixty dollars to the plaintiff, and an absolute loss to the defendants.

Our liberal system of practice encourages amendments when they can be made to aid the administration of justice consistently with the rules of law and the rights of the parties; (2 R. C. 1855, p. 1253;) and, though it is with great hesitation that this court will interfere with the exercise of the discretion of inferior courts on this subject, we think that the circumstances of this case call for our interposition. The amendment, of course, should only have been made on terms that would have prevented a surprise or an injury to the plaintiff.

The judgment will be reversed, and the plaintiff having

Brosius v. McGaugh.

remitted sixty dollars, to be credited at the time it was paid, judgment will be rendered in this court, deducting the credits allowed in the circuit court and the said sixty dollars. Judge Napton concurs.

SCOTT, Judge. I concur in reversing the judgment and for rendering judgment in this court.



BROSIUS, Appellant, v. MCGAUGH, Respondent.

1. In cases commenced since the revised code of 1855 went into effect, (May 1, 1856,) the courts are not authorized to make findings of facts; if made, they do not form part of the record, and will not be regarded by the supreme court for any purpose.

Appeal from Daviess Circuit Court.

E. B. Ewing, for appellant.

RICHARDSON, Judge, delivered the opinion of the court.

The practice of finding the facts in cases tried without a jury has been abolished, and in a case therefore commenced since the revised statutes of 1855 took effect, the finding of the facts by the court can not be regarded for any purpose, as it has no place in the record. (Martin v. Martin's adm'r, 27 Mo. 227.) Under the code of 1849 the finding was required to state facts and not the evidence; and it was never the office of a finding to set out the evidence, and it was never treated as a bill of exceptions containing the evidence. The record in the case calls for a bill of exceptions, but an examination of it will show that none of the evidence is preserved unless it can be inferred from the finding. The evidence then not being preserved, the instructions can not be reviewed. (State v. Vaughn, 22 Mo. 20.) The other judges concurring, the judgment will be affirmed.

State v. Gregory.

THE STATE, Respondent, v. GREGORY, Appellant.

1. An indictment, founded on section 1 of the act regulating dram-shops, charging that the defendant, on, &c., at, &c., sold intoxicating liquors, to-wit, one quart of whisky, "without having any license for that purpose continuing in force during all that time authorizing him so to do," &c., is sufficient; it sufficiently negatives any legal authority on the part of defendant to sell intoxicating liquors.

Appeal from Laclede Circuit Court.

Wood, for appellant.

I. The court erred in overruling the motions to quash and in arrest. (State v. Brown, 8 Mo. 210; Neals v. State, 10 Mo. 499; State v. Black, 9 Mo. 681.) The indictment must negative every license specifically authorizing the sale of intoxicating liquors; (State v. Haden, 15 Mo. 447;) also every other legal authority for selling. (24 Mo. 363; State v. Sutton, 25 Mo. 300; see also 1 R. C. 1855, p. 685.)

Ewing, (attorney general,) for respondent.

I. The indictment was good.

RICHARDSON, Judge, delivered the opinion of the court.

The defendant was indicted under the first section of the act concerning dram-shops, which declares that "no person shall directly or indirectly sell intoxicating liquors in any quantity less than one gallon without taking out a license as a dram-shop keeper. (R. C. 1855, p. 683.) The indictment charges that the defendant, on the 1st of August, 1857, at Laclede county, sold intoxicating liquors, to-wit, one quart of whisky "without having any license for that purpose continuing in force during all that time authorizing him so to do," &c. It was objected, in the motions to quash and in arrest, that the indictment did not sufficiently deny any legal authority to the defendant to sell intoxicating liquors; but we think the right to sell is sufficiently nega-

State v. Crabtree.

tived by the averment that the defendant did not have any license for that purpose. The 18th section of the dram-shop law contains an exception to the general prohibition, and permits intoxicating liquors to be sold in any quantity not less than a quart at the place where made, provided that the maker or seller does not permit the same to be drank at the place of sale. The exception is by way of proviso, and need not be noticed in the indictment, but must be insisted on as a defence. (Tracy & Wakrendorff v. State, 3 Mo. 1.) The judgment will be affirmed; the other judges concurring.

THE STATE, Respondent, v. CRABTREE, Appellant.

1. An indictment founded on the 36th section of the 8th article of the act concerning crimes and punishments (R. C. 1855, p. 631) charging that the defendant, on, &c., at, &c., "did then and there unlawfully keep open a grocery by then and there permitting persons to enter said grocery and then and there to drink intoxicating liquors," is good.
2. To authorize the conviction of a grocery-keeper on such an indictment, it is not sufficient that he permits persons to enter his grocery on Sunday and to drink intoxicating liquors there; it must appear that the acts done by him are done for the accommodation of customers and in continuation of the usual business of the week.

Appeal from Laclede Circuit Court.

Wright, for respondent.

I. Both counts in the indictment are bad. The motion to quash should have been sustained.

II. The instructions on the part of the State were wrong, and those asked by defendant should have been given.

Ewing, (attorney general) for the State.

I. The indictment is sufficient. (R. C. 1855, p. 631, sec. 36; State v. Buford, 10 Mo. 703; State v. Sutton, 24 Mo. 377.) The instructions given to the jury presented the law of the case fairly to the jury. The instructions refused were not the law.

NAPTON, Judge, delivered the opinion of the court.

This indictment was for a breach of the 36th section of the 8th article of the act concerning crimes and punishments. That section prohibits, under a penalty, "exposing to sale any goods, wares or merchandise; keeping open any ale or porter house, grocery or tippling-shop; and selling or retailing any fermented or distilled liquor, on the first day of the week, commonly called Sunday."

The indictment charged that the defendant, on, &c., at, &c., did then and there unlawfully keep open a grocery by then and there permitting persons to enter said grocery and then and there to drink intoxicating liquors." The proof was that the witness and others opened the door of defendant's grocery, went in and immediately shut the door after them; that two of them took a dram; that defendant set out the liquor; that defendant did not sell the liquor; that the door of the grocery had been shut previously to the entrance of witness and his friends, and that it was not permitted to stand open. The court instructed the jury as follows: "1. If the jury shall believe from the evidence that defendant at any time within one year before the finding of the indictment, and within the county of Laclede, kept open a grocery upon the first day of the week, commonly called Sunday, they should find the defendant guilty. 2. If the defendant was the keeper of a grocery and permitted persons to enter it on Sunday and to drink intoxicating liquors in such grocery, it was keeping open such grocery within the meaning of the statute." The defendant asked several instructions, which in substance were designed to declare the law to be that the facts proved by the witness and referred to in the instructions given would not themselves constitute the offence punished by the act unless the jury were satisfied that such acts were done or permitted with a view to evade the law, or to allure customers, or to carry on his usual business. These instructions were refused and a verdict was found against the defendant.

The indictment we think sufficient, as the charge is in the words of the statute, and the definition of the offence attempted may be rejected as surplusage. Nor are we prepared to say that the evidence was not sufficient to justify a verdict; but we think the defendant's instructions should have been, given or some explanations equivalent thereto. The object of this statute is very plain; it is to prohibit a continuance of certain employments on Sunday under certain named penalties. All traffic in merchandise of every description is to cease on Sunday, and all retailers or venders of liquors are to cease their occupation on that day. It is of no consequence whether the door of the grocery or dram-shop is kept open or shut. If the business of the week is carried on openly or secretly the law is broken. A grocery-keeper, under the present law, has no authority to retail spirituous liquors at any time. The simple fact that he permits one or more acquaintances to enter his grocery and drink spirituous liquors on Sunday is not of itself a breach of this law. It may be of another. It may be evidence and very sufficient evidence to authorize a conviction under this law, depending upon circumstances and motives to be determined on by the jury. If the jury are satisfied that such acts are done for the accommodation of customers and are, in truth, a continuation of the usual occupation of the week, they may very well find the defendant guilty.

There may be attempted evasions of the law, and the jury must judge of these matters; but it is very obvious that the defendant may have done every thing which is hypothetically stated in the instructions given by the court, and yet totally innocent of a violation of the Sabbath. Juries are however very likely to be able to draw correct conclusions upon such evidence, and can readily understand the motives of certain acts. But the jury must have an opportunity of passing upon the intent as well as the acts.

The court in this case did not allow the question of intent to go to the jury. Very likely the verdict would have been

Bancroft v. Bruning.—Barton v. Murrain.

the same ; but we can not know how this might have been, and must therefore reverse the judgment and remand the cause ; the other judges concur.

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BANCROFT, Plaintiff in Error, v. BRUNING, defendant in Error.

1. Case affirmed because no exceptions were saved.

Error to Buchanan Court of Common Pleas.

Loan, for plaintiff in error.

Gardenhire, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

This case was tried by the court without a jury. No exceptions were taken during the progress of the trial, and the court was not called on to make any declaration of law touching the case. So that nothing was saved that will authorize the interposition of this court. The judgment will be affirmed ; the other judges concurring.

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BARTON, Plaintiff in Error, v. MURRAIN, Defendant in Error.

1. An exemplification of a patent certified by the Commissioner of the General Land Office, may be received in evidence without proof of the loss of the original patent.
2. Under the general law of the state certified copies of deeds of conveyance may be received in evidence upon proof that the originals are not "within the power" of the party offering such copies—that is, not within his control or possession, nor in the possession of his agent, servant or bailee.
3. Where, however, deeds conveying portions of the military bounty land in this state are executed in other states of the Union, and acknowledged and proved in accordance with the laws and usages of such states and not in accordance with the law of this state, certified copies of such deeds can be read in evidence only upon proof of the loss or destruction of the original.
4. The loss of such instruments should be presumed if it appear that search has been made in the proper places and by the proper persons, and that they can not be found after due diligence has been used in looking for them.

Barton v. Murrain.

Error to Linn Circuit Court.

This was an action to recover possession of a tract of one hundred and sixty acres of land. In support of her title the plaintiff introduced in evidence, against the objection of defendant, an exemplification of a patent to one Aaron Dresser certified by the Commissioner of the General Land Office. Certain preliminary proof was offered and received with a view to show the loss of the original.

The plaintiff then offered in evidence a copy of a deed executed by Aaron Dresser in favor of one Romulus Riggs. The copy was certified by the clerk of the circuit court of Howard county, in the state of Missouri. The offering of this certified copy in evidence was accompanied by the following preliminary proof: Thomas Shackelford, a witness, stated that he had requested one Stephen Donohoe, now dead, to apply to the administrator of William Rector's estate in St. Louis county for the title papers relating to the tract in controversy; that Donohoe informed him that he had so applied, and was informed that the papers belonging to said estate were in the clerk's office; that he applied to the clerk, who made search, and informed him that all the title papers belonging to Rector's estate had been abstracted from the office; that after the death of Donohoe he wrote several letters for Wharton R. Barton and requested him to send them to St. Louis and have inquiry made for said title papers, also, a letter to be forwarded to Romulus Riggs, Baltimore, making inquiry for said deed from Dresser to Riggs; that he had a letter from St. Louis stating that no trace of said deed could be found. Wharton R. Barton testified that he forwarded letters to St. Louis and Baltimore making inquiries for the deed from Dresser to Riggs; that he received no answer from Riggs. This deed of Dresser was acknowledged in the state of Massachusetts before a justice of the peace. The defendant contended that the official character of the justice was defectively certified or authenticated. The court,

Barton v. Murrain.

on the objection of defendant, excluded the deed ; whereupon the plaintiff took a nonsuit, with leave, &c.

Shackelford, for plaintiff in error.

I. The land in dispute being a part of the military bounty land, the deed was admissible in evidence. (R. C. 18—, p. 366, sec. 51.) The deed was made in Massachusetts, and by the law of that state was properly acknowledged before a justice of the peace. It was properly admitted to record without further proof. It was admissible in evidence without any certificate of the clerk to the official character of the justice. The law of Massachusetts did not require such a certificate.

II. Even if the certificate was necessary, the certificate accompanying the deed is sufficient.

III. The preliminary proof was amply sufficient.

Harris & Boardman, for defendant in error.

I. The preliminary proof was insufficient.

II. The certificate of George Bradbury to the official character of the justice is insufficient. He styles himself clerk of the "judicial courts," and says that he affixed the seal of the "county." It does not appear that he had authority to use the seal of the county. There is no copy or representation of his official seal.

RICHARDSON, Judge, delivered the opinion of the court.

The exemplification of the patent certified by the Commissioner of the General Land Office was properly received in evidence without proof of the loss of the original ; and it is said to be evidence of as high a nature as the original, as it is a recognition by the government itself of the validity of its own grant under its own seal. (Patterson v. Winn, 5 Pet. 242.) But we think that the copy of the deed from the patentee to Riggs was properly rejected.

When there is no ground of suspicion that a paper is intentionally withheld, and there is no apparent motive for

deception, the courts are very liberal in regard to secondary evidence. Thus, it has been held that a party claiming under a warranty deed is not presumed to hold the title papers anterior to his own deed, because they are supposed to be in the hands of his warrantor, who retains them for his own protection; (Lord Buckhast v. Fenner, 1 Coke, R. 1; Jackson v. Woolsey, 11 John. 453; Eaton v. Campbell, 7 Pick. 10; Cook, lessee, v. Hunter, 2 Tenn. 113;) and in such cases copies may be read; also, that a purchaser at a sheriff's sale may give copies in evidence when it is necessary to deduce the title of the person whose property has been sold, because he is only privy in estate and is not supposed to have the custody of the original; (Den, d. v. Hilliard, 2 Murph. 270;) and that a copy is admissible when the grantee, who is presumed to have the original, is out of the state; (Boone v. Dyke, 3 Mon. 532; 7 Pick. 10;) or the paper is in the hands of a third person under such circumstances that the law will not compel him to produce it, or that he is beyond the process of the court. (United States v. Reyburn, 6 Pet. 352.)

In reference to instruments conveying or affecting real estate in this state, which are acknowledged or proved, certified and recorded, pursuant to the general law on the subject, the same spirit of liberality is indicated in the 46th section of our act concerning conveyances, (1 R. C. 1855, p. 365,) which declares that when it shall be shown to the court by the oath or affidavit of the party wishing to use a copy, or of any one knowing the fact that such instrument is lost or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record certified by the recorder under the seal of his office, may be used without further proof. It is not necessary to show that the instrument is lost or destroyed, but the transcript may be used upon proof that the original is not within the power of the person offering it. (Gilbert v. Boyd, 25 Mo. 27.) The words of the statute, "not within the power," should be construed as not within the control or possession of the party

Barton v. Murrain.

wishing to use a copy—that is, not in the possession of the party, his agent, servant or bailee, or other person under his control. Therefore, if the original is presumed to be in the hands of a third person, a copy may generally be read without the preliminary oath or affidavit of the party wishing to use it; and, in all other cases, in the absence of any suspicion of unfairness, nothing more should be required than that the oath or affidavit should show that the original is not within the control of the person offering a copy.

The property in controversy is a part of the military bounty land, and there is special legislation in reference to instruments conveying or affecting land in the military district, the policy of which is obvious. The 51st section of the act concerning conveyances (1 R. C. 1855, p. 366) provides that every instrument in writing, which conveys or in any way affects any real estate situate in this state and being part of the military bounty land in this state, “which has been or may hereafter be made and executed out of this state and within the United States, and which has been or may hereafter be acknowledged or proved in conformity with the laws and usage of the state, territory or district, in which such instrument has been or may hereafter be made, executed, acknowledged or proved, for the execution, acknowledgment or proof of instruments in writing, conveying or affecting real estate within such state, territory or district, shall be recorded in the county in this state in which such land be situated.” And the 55th section permits copies of such instruments or of the record of the same, duly certified, &c., to be read in evidence, with like effect as if the original were produced and read, *upon proof of the loss or destruction of the original instrument.*

It will be observed that, though the legislature, out of tenderness to the vendees of the soldiers of the war of 1812—the great majority of whom were nonresidents of this state—allowed to be recorded conveyances of land in the military district, with certificates of acknowledgment that are insufficient to deeds conveying land in other parts of the state,

Barton v. Murrain.

it denies the right to use secondary evidence in such cases under the same circumstances that it is permitted in cases of ordinary deeds. In one case, a copy may be used upon proof that the instrument is *lost and not within the power of the party wishing to use it*; but in the other, *only on proof of the loss or destruction of the original*. The difference in the language of the 46th section and 55th section is too marked to be the result of accident, and we suppose it was intended to impose stricter terms on one class of instruments than on the other.

It is not however deemed necessary, in order to let in secondary proof of the contents of a deed conveying land in the military district and not acknowledged according to the general law, that there should be evidence of an absolute loss of the original. In the nature of things, it is seldom that an actual destruction of a paper can be shown, and proof falling short of this must be received, and, as a general rule, it ought to be sufficient to raise the presumption of loss that search has been made in the proper place and by the proper person, and that the paper can not be found after due diligence has been used in looking for it.

The deed may have been acknowledged in conformity to the laws of Massachusetts where it was executed, but the preliminary proof of the loss of the original was not sufficient to admit the copy in evidence. It does not appear from the testimony of Mr. Shackelford or of Mr. Barton that either of them ever made any search at any place or time, or ever had an interview with any person who had the right to the custody of the original. It is not shown that Rector's estate ever had any connection with the land; and if it had, the second-hand statements of the administrator would not be received, because he is a competent witness and might be called to testify, and therefore his declarations were mere hearsay and inadmissible. The other judges concurring, the judgment will be affirmed.

Clawwater v. Tetherow.

CLAWATER, Appellant, v. TETHEROW, Respondent.

1. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds.

Appeal from De Kalb Circuit Court.

It is deemed unnecessary to set forth the facts more fully than they appear in the opinion of the court.

Shambaugh, for appellant, cited 2 Story Eq. § 1050, 1201-1211, 385, 423, 439; Kent, Comm. 305-6; 2 Mo. 109; 15 Mo. 370; 21 Mo. 331; 1 Stark. on Ev. 74; 1 Greenl. Ev. § 27, 204; 19 Mo. 204; 14 Mo. 488; 2 Smith L. Cas. 544.

NAPTON, Judge, delivered the opinion of the court.

The petition in this case proceeds altogether on the assumption that James, from whom the plaintiff purchased, had an interest, equitable or legal, in the land which defendant had purchased from Clark. But looking at the petition and answer, and all the testimony in the case, which comes alone from James and Clark themselves, there is no ground for the assumption.

This is not a case of a purchase by one man in his own name with the money of another; nor is it the case of a purchase with one's own money in the name of another. The defendant purchased with his own money and took the title to himself. James, who acted as agent in negotiating the purchase, so far as we can see, had no interest in the land, equitable or legal. It seems from the petition and answer, as well as the testimony of James, that there was a verbal understanding between defendant and James that upon James' paying before the 1st of December, 1854, one-half of the purchase money and interest, he was to be a partner in

Clawater v. Tetherow.

the ownership of the land. Conceding this contract to be obligatory, it did not make James a partner at the time of his sale to plaintiff. The fact was, as all the testimony shows, that he never paid a cent towards the purchase, nor even towards defraying the expenses of surveying and laying out the land into town lots.

There is an attempt in the petition to make the defendant's purchase the result of a fraudulent arrangement between defendant and James to cheat James' creditors; and, strange to say, James himself, who is the principal witness in the case, proves this charge to be true. But it is not easy to see how James' creditors could possibly be injured by the investment of defendant's money in the land, and, although James' intentions may have been as fraudulent as he himself represents them, and the defendant may have had every disposition to aid, nothing was done to promote such a scheme.

It might be very well questioned whether there was any consideration for the promise of defendant to James. It seems to be a mere *nudum pactum*. So far as the testimony shows, James advanced no money; and the effort of the plaintiff, who bought James' interest, seems to be to share in the profits of a speculation, if there are any, towards which James advanced nothing, contributed no means, and assumed no responsibilities or risk of any kind. This, however, is not material, as there was no proof that the contract or agreement was complied with, even if it was binding. That the contract was within the statute of frauds is plain; but as it was admitted in the shape we have stated it, that is not regarded as a material question in the case. Upon the whole, we think the circuit court properly dismissed the petition upon the hearing.

The other judges concur, judgment affirmed.

Dillon v. Rash.

DILLON *et al.*, Defendants in Error, v. RASH, Plaintiff in Error.

1. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day of the execution issued by the justice, the circuit court should quash such execution.

Error to Atchison Circuit Court.

A judgment was rendered by a justice of the peace against one Rash. On the 2d of March, 1858, an execution was issued by said justice on said judgment. On or about the 27th of March, the constable returned said execution endorsed "no goods and chattels found," &c. On said 27th of March, an execution issued from the office of the clerk of the Atchison circuit court upon a transcript of the said judgment, returnable to the April term, 1858, of said court. This execution was levied on certain real estate of defendant Rash, who moved the court to quash said execution. The court overruled the motion.

Loan, for plaintiff in error.

I. The execution issued without the authority of law. The execution could not be legally returned by the constable before the time limited by the writ for its return, so as to authorize an execution to issue from the office of the clerk of the circuit court. (See 5 Wend. 276; 9 Wend. 368.)

Patterson, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

The conduct of the plaintiffs in this proceeding has very much the appearance of a design to deprive the defendant of an advantage secured to him by law, and we see no reason why they should not have been arrested in their course. The

Dillon v. Rash.

law was made as well for defendants as for plaintiffs. Whilst it does justice to the creditor, it also intended to show a little indulgence to the debtor.

It is well known that the periods between the date and return of executions in justices' courts were fixed with a view to give defendants a little time to prepare for their payment. Formerly, all executions from justices' courts, without regard to their amount, were returnable in thirty days. The law has since been changed for the relief of defendants.

We are not prepared to say that a sale under an execution founded on a *return* like that in the present case would be regarded as a nullity in a collateral action, when the interests of third persons were involved. That is not the question here. The motion made in this cause, if it had been successful, would have prevented the occurrence of such a question, and as the proceeding was irregular it should have been sustained. Regularly, an execution can not be returned before the return day. If search is made and no property is found, it does not follow but that the defendant may have property before the return day of the execution. He may acquire it after the return is made. Under such a construction of the statute as has been given, a judgment may be obtained, a transcript filed, an execution issued and returned, and an execution awarded from the office of the clerk of the circuit court and levied, all on the same day, with a view to be enabled to sell the real estate of a defendant at a circuit court that is only twenty or thirty days ahead.

It does not appear that there is any supersedeas in this case. If the execution from the circuit court has been executed and a person other than the plaintiffs has become the purchaser of the land and received a deed, other considerations may arise than those which grow out of the present motion.

In want of knowledge how the matter stands, the judgment will be reversed and the cause remanded. The other judges concur.

Trigg v. Taylor.

TRIGG, Appellant, v. TAYLOR *et al.*, Respondents.

1. A material alteration of a promissory note or bill of exchange will render the same invalid, even in the hands of an innocent holder, as against any party thereto not consenting to the alteration.
2. This rule applies to an accommodation note fraudulently altered before it is negotiated.

Appeal from Cooper Court of Common Pleas.

This was an action upon a negotiable promissory note for \$1,500, dated May 8, 1857, made by W. W. Norris and John Taylor in favor of said Norris, and endorsed by Norris to plaintiff Trigg. Norris failed to answer. Taylor answered denying the execution of the note sued on. At the trial, it appeared in evidence that Taylor signed a note for \$500 with said Norris and for his accommodation; that this note was fraudulently altered by Norris to a note for \$1,500 and endorsed to plaintiff. This note, as altered, is the note sued on in this suit. The evidence conduced to show that the alteration was so skillfully done that in the ordinary transactions of business it would not have been noticed.

The cause was tried by the court without a jury. The plaintiff asked the court to give the following instructions or declarations of law: "1. Defendant Taylor admits that he signed the note offered in evidence. 2. Even if the court find from the evidence that the instrument sued upon was altered by Norris after it was executed by Taylor, yet the court must find for the plaintiff unless the court shall further find that the alteration was made after the note came to the hands of plaintiff, or that said alteration was so obvious or apparent upon the face of said instrument as to prevent a person exercising reasonable care and diligence from the purchase of the same. 3. The presumption of law is that the alteration or erasure, if any exist, was made at the time of, or anterior to, the execution of the note; and it devolves upon the defendant to show otherwise, unless the note pre-

Trigg v. Taylor.

sents upon its face such marks of alteration or erasure as would excite the suspicion of a man reasonably prudent and cautious in the transaction of business. 4. If the instrument sued upon was prepared by the defendants Norris and Taylor as an accommodation note for the benefit of Norris for the sum of \$500, and the same was altered by the defendant Norris so as to make it appear upon its face a note for \$1,500 before it came to the hands of plaintiff, or before it became an available instrument in the hands of any other person, then the court will find for the plaintiff the amount of said note, unless the court shall further find that the alteration was such as ought to have excited the suspicion of a prudent and careful man in the purchase of said note. 5. If the court find from the evidence that the note sued upon was executed by defendant for the sum of \$500, then the plaintiff is entitled to recover that amount, unless said instrument was altered after it came into the hands of plaintiff." Of these declarations of law, the court gave the 1st and 3d, and refused the others.

The court gave the following declaration at the request of defendant Taylor: "6. If the court find from the evidence that the note sued upon was for \$500 when it was executed by defendant Taylor, and further finds that the same was afterwards altered by Norris, without the consent or knowledge of defendant Taylor, before it was transferred to plaintiff, then said note is void as to defendant Taylor."

The court rendered judgment against plaintiff.

Stephens & Vest, for appellant.

I. The court erred in refusing the fourth declaration asked by plaintiff. (See 8 Mo. 235; 2 Mason, 278; Byles on Bills, 255, 256; 8 Ad. & El. 136; 1 C. & M. 721; 1 C., M. & R. 127; 4 Tyrw. 598.) The court erred in refusing the second instruction asked by plaintiff. (Ib.; 15 Mo. 342.) So also in refusing the fifth instruction. (8 Mo. 235; 2 Mason, 478; Story on Bills, 187, 191.) The court also erred in giving instruction asked by defendant. (Ib.; 3 Kent, Comm. 79; Bayley on Bills, 512, 516; 9 Cranch, 37.)

Trigg v. Taylor.

Adams, for respondents.

I. The alteration of the note by Norris before he passed it to Trigg was a forgery and rendered the note absolutely void as to Taylor. (*Byles on Bills*, 253.) The fact that the alteration is so skillfully executed as to deceive a prudent man in the ordinary transaction of business is wholly immaterial.

RICHARDSON, Judge, delivered the opinion of the court.

It is a general rule that any alteration in a material part of a bill of exchange or promissory note, as in the date, sum, or time when payable, or consideration, or place of payment, will render the bill or note invalid, as against any party thereto not consenting to such alteration, even in the hands of an innocent holder. (*Edwards on Bills*, 95; *Chitty on Bills*, 182; *Woodworth v. Bank of America*, 19 John. 391; *Nagro v. Fuller*, 24 Wend. 374; *Bruce v. Westcott*, 3 Barb. 374.) The application of this principle is not affected by the skillfulness with which the alteration is made, or the probability that the closest observer will fail to discover it. In *Hall v. Fuller*, 5 Barn. & Cress. 750, a check, properly filled up for three pounds, drawn by a customer on his banker, came into the hands of a third person, who by a chemical process expunged the original sum and inserted a larger sum, but in such a manner that no person in the ordinary course of business could observe it. The banker paid the check, and it was decided that he could not charge the customer for any thing beyond the sum for which the check was originally drawn, and that as the customer in drawing the check gave no opening to the fraud, the consequences of it fell on the banker.

No good reason is perceived why the rule would not prevail in the case of an accommodation note fraudulently altered before it is negotiated; and the cases that distinguish accommodation paper, before it is issued, and negotiated instruments, will be found, we think, to have arisen under the

Trigg v. Taylor.

English stamp acts. The altered note is no more the act of the maker in one case than in the other; and because a person may be willing to serve a friend by the use of his name for a given sum, it is against the usual course of such transactions and the experience of men to say that an authority is inferred to substitute a large sum for that mentioned and fully written in the body of the note. The recognition of such a doctrine would destroy all confidence, for few men would be willing to aid others at the expense of their own ruin, which no degree of caution could avert. If a blank is left for the amount to be inserted, it may be said with some propriety that the person signing the instrument may be considered as having authorized it to be filled up for any amount, and that it is proper that he, rather than an innocent holder, should suffer the consequence of any abuse of his confidence; but no such authority can be presumed when the instrument is complete and the blanks entirely filled. If, however, a bill, note or check is so negligently drawn, with blank spaces left for the addition of other words or figures, that alterations can be made so as not to excite suspicion, the loss ought to fall on the person in fault; according to the familiar rule, that when one of two persons must suffer by the act of a third, the one who affords the means to the wrong-doer must sustain the loss. This was the principle on which *Young v. Grote*, 4 Bing. 253, was decided. In that case, a customer of a banker delivered to his wife printed checks, signed by himself, with blanks for the sums to be filled up by her. She caused them to be filled up with the words *fifty pounds*, the *fifty* being commenced with a small letter in the middle of a line, and in this condition she delivered the check, which was afterwards altered by inserting at the beginning of the line in which the word *fifty* was written, the words *three hundred*. The banker paid the check for three hundred and fifty pounds, and it was held that the loss must fall on the customer. But the case at bar was not tried on this theory; and the question whether the defendant was guilty of negligence in leaving open spaces in the note

Ferguson v. Ham.

so that Norris, with greater facility, could alter the amount and impose on the plaintiff, was not submitted to the jury in any of the instructions.

The fifth instruction asked by the plaintiff was properly refused, because the fraudulent alteration avoided the security, and as the plaintiff could not recover by force of the instrument on which he declared, he could not recover at all. (*Sutton v. Toomer*, 5 Barn. & Cress. 416; *Chitty on Bills*, 191.) The other judges concurring, the judgment will be affirmed.

FURGUSON & BROCK, TO THE USE OF HAM *et al.*, Plaintiffs in Error, v. LEWIS & BASKET, Defendants in Error.

1. An action of unlawful detainer can not be maintained in the name of one person to the use of another; it can only be maintained by the person or persons entitled to the possession of the premises in controversy.

Error to Newton Circuit Court.

This was an action of unlawful detainer. In the complaint, in the justice's docket, and throughout the proceedings, the cause was entitled as follows: "George W. Ferguson and John Brock, to the use of Thomas J. Ham, Hilliard Hicks, Alexander Hale and James F. Wilcoxon, plaintiffs, against Reuben Basket and Moses Lewis, defendants. Unlawful detainer." Judgment was rendered in favor of plaintiffs by the justice of the peace before whom the proceeding was instituted. The cause was taken by appeal to the circuit court, which dismissed the suit on account of the defectiveness of the complaint.

F. P. Wright, for plaintiffs in error.

- I. The reasons assigned were not such as authorized the court to dismiss the cause. The petition or statement con-

Ferguson v. Ham.

tains all the facts requisite to enable plaintiffs to recover for an unlawful detainer, and no reason is perceived why the court dismissed the cause.

SCOTT, Judge, delivered the opinion of the court.

There is an irregularity in the proceedings which takes away the possibility of its being sustained. According to law, Ferguson and Brock are the real plaintiffs; and if they were the persons really entitled to sue, by having the legal right to the possession of the premises in controversy, we would not consider their statement bad because they had added what followed their names. The whole of it might have been rejected as surplusage. But the misfortune is, that while Brock and Ferguson stand on the record as the real plaintiffs, it appears that those for whose use and benefit the suit is brought are those entitled to the possession of the disputed premises. We do not recollect an instance in which a complaint of an unlawful detainer was begun by one to the use and benefit of another. We are puzzled in conjecturing a reason for such a mode of procedure. If Ferguson and Brock had the right to the immediate possession of the lot in dispute as trustees for those for whom they sued, it would not have been necessary to have stated it, though a statement of the names of those for whose use the suit was brought would have done no harm. If those for whose use the complaint was brought were purchasers from the original lessors, they might, as the law now stands, have brought the suit in their own names; and if the statute had not allowed it, surely they did not expect to evade the law by the device they adopted. (R. C. p. 794, sec. 37.)

Affirmed. The other judges concur.

Eads v. Wooldridge.

EADS *et al.*, Respondents, v. WOOLDRIDGE, Appellant.

1. The official character of school trustees may be proved by their acts and conduct as such; the oaths of office filed by them with the clerks of the county courts and their official bonds are competent evidence to prove such official character.
2. In an action of forcible entry and detainer, in case of a verdict for the complainant, the jury may assess damages for all waste and injury committed upon the premises as well as for all rents and profits of the same up to the time of the rendition of the verdict.

Appeal from Cooper Court of Common Pleas.

This was an action of forcible entry and detainer brought by plaintiffs, as trustees of school district No. 2, of township 48, range 17, in Cooper county, to recover possession of a lot of ground with a school-house thereon.

At the trial, the plaintiffs, to prove their official character, introduced the clerk of the county court, who produced the affidavits and bonds of plaintiffs, as trustees of said school district, and offered to prove by said clerk that the plaintiff had taken the oaths required by law of school trustees; that Eads had given bond as president; and that plaintiffs were acting as trustees on the 22d of March, 1858. The court overruled the objection of defendant to this testimony and admitted the same. It also appeared that school had been kept in the house in question for ten years, but that none was kept therein at the commencement of this suit; that defendant removed the furniture of the school-house and took possession thereof, and refused to permit the trustees to occupy the same as a school-house. The plaintiff also introduced in evidence the following instrument in writing, executed by defendant: "Know all men by these presents, that whereas, Samuel Wooldridge, by these presents, hereby grants unto the trustees of school district No. 2, township 48, range 17, a perpetual lease of one acre lot or parcel of land, the said land being that upon which the school-house of said district is now situated; the understanding of this contract is that

Eads v. Wooldridge.

the aforesaid one acre lot or parcel of land is to remain subject to the trustees of said district as long as it may be wanted for school purposes; and it is not to be inferred or presumed that the said land may not be wanted for school purposes in case the district should become disorganized, unless it should so remain for the terms of three years, at the expiration of which time it may revert back unto the said Samuel Wooldridge, his heirs or assigns. Given under my hand and seal the 18th day of June, 1854. [Signed] Samuel Wooldridge. (Seal.)"

The court, at the instance of the plaintiff, gave the following instructions: "1. If the jury believe from the evidence that the plaintiffs were in possession of the school-house at the time mentioned in the complaint, and that defendant entered and took possession of the same by means of a false key, or by forcing off or bursting the lock, or by breaking open or forcing the door, or by breaking the window or any part of the building, this amounts to a forcible entry in contemplation of law. 2. To establish the plaintiff's possession, it is not necessary that they or either of them should have been in the actual occupancy of the house; a man may have the possession of a house otherwise than by living in it; he may have part of his goods there; and if the jury find from the evidence that the desks, stove, benches, or any furniture belonging to the school district mentioned in the complaint, were in the school-house, and the plaintiffs or either of them had locked the house and had the key, then the plaintiffs, in contemplation of law, were in possession. 3. If the jury find for the plaintiffs, they will assess damages for all waste and injury committed upon the premises, as well as for all rents and profits of said premises up to the present time."

The jury found for plaintiffs.

Douglass & Hayden, for appellant.

I. There was no legal evidence that the plaintiffs were trustees of school district No. 2. The affidavits and bonds of plaintiffs produced by the county clerk were not admissi-

Eads v. Wooldridge.

ble in evidence to prove that plaintiffs were trustees. There was better evidence of that fact, and its absence was unaccounted for. (R. C. p. 1434.) Only examined copies of the originals could be received in evidence. The acts of the trustees might be evidence against them, but not for them. (Greenl. Ev. § 56, 92; 8 T. R. 303; *Gilbert v. Boyd*, 25 Mo. 29.) The court erred in refusing the second instruction asked by the defendant. (4 Johns. 418; *Wood v. Leadbetter*, 10 M. & W. 837; 10 Conn. 375; 2 Amer. Lead. Cas. 677.) The instrument signed by Wooldridge was nothing more than a license, and was revocable at any time. The instructions given at the instance of the plaintiffs were erroneous. (19 Mo. 128, 169; R. C. 1855, p. 791; 14 Mo. 17; 18 Mo. 256.)

Muir & Draffen, for respondents, cited R. C. 1855, p. 790, 792, 1436; 8 Mo. 977; 6 Mo. 347; 4 Bibb, 389, 426; 3 Marsh. 347; *Story on Contracts*, § 427; 2 *Smith's Leading Cases*, 507; 3 Hill, 219; 14 Mo. 488; 24 Mo. 184; 4 Kent, Comm. 452.)

Scott, Judge, delivered the opinion of the court.

The most important question in this case is, as to the competency of the evidence to establish the fact of the election or appointment of the plaintiffs as trustees of the school district for which they sue. If nothing but the minutes of the meeting at which an election of trustees is made is admissible evidence of their official character, the school law must fail to be executed in a great many instances. The want of method in the transaction of business under our school system is notorious, and to expect a strict compliance with the law would be to render it of no avail in a great many of the school districts. Under the school law in New York, which suggested to us the idea of our system, it has been held that the official character of school trustees may be proved by reputation and their acts and conduct as such. (*McCoy v. Curtice*, 9 Wend. 18.) In Connecticut, a

Eads v. Wooldridge.

clergyman in the celebration of marriage is a public civil officer, and his acts in that capacity are admissible as *prima facie* evidence of his official character. (Goshen v. Stonington, 4 Conn. 209.) Indeed it is a general rule that, in order to prove a general allegation that a party holds a particular office or situation, it is usually sufficient to prove his acting in that capacity; and this rule is applicable to cases in which the officer is plaintiff. (2 Starkie, part 4, tit. Character.) The proof of the affidavits and bonds given by the plaintiffs as trustees was admissible as evidence of their acts as trustees.

We are not of the opinion that the deed of conveyance given in evidence is nothing but a license. The instrument by its terms furnishes no support for such an idea. It grants a perpetual lease, and there is nothing in it which shows that such was not the understanding of the parties. But if it had been a license and nothing more, how would the defendant have been justified? If he licenses another to occupy his land and afterwards sees proper to revoke his license, can he thereupon go and forcibly eject the occupant? For the recovery of the possession, must he not resort to his legal remedy, and not take the redress of his wrong into his own hands?

What will constitute a possession must depend upon circumstances. The purposes for which a tenement is used has its influence in ascertaining the acts and conduct which will determine whether or not there is a possession of it. If the circumstances established by the evidence were not sufficient to show the possession of a school-house, it would be difficult to retain possession of a building used for such a purpose but by continually holding a school in it without any intermission or vacation.

The third instruction given for the plaintiffs in relation to the damages to be recovered, it is conceived, is in accordance with the provisions of the 17th section of the act concerning forcible entry and detainer.

Judgment affirmed. The other judges concur.

THE STATE, Respondent, v. EPPERSON, Appellant.

1. If one having a gun in his hands raises it to a level and directs it towards, but not directly at, another, and threatens to kill him if he advances in a certain direction, it will constitute an assault; it is not necessary that the gun should be raised to the shoulder.

Appeal from Greene Circuit Court.

The facts sufficiently appear in the opinion of the court.

Hendrick, for appellant.

Ewing, (attorney general,) for the State, cited *Hays v. People*, 1 Hill, 353; *State v. Chandler*, 24 Mo. 372; *State v. Smith*, 2 Humph. 458; 11 Ired. 476.)

NAPTON, Judge, delivered the opinion of the court.

This was an indictment for an assault with a gun, with intent to kill, and the terms of the charge were that the gun was levelled "at and against the body of one Gibson." The proof was that Gibson was a deputy sheriff and went to defendant's house to levy an execution; that the defendant threatened to kill him if he went to the door of defendant's house—Gibson being then advancing in that direction; that defendant then raised his gun to a level with his heart, with his left hand on the barrel and his right hand on or near the trigger, with the muzzle pointing towards Gibson, but a little to the left; that Gibson thereupon drew his pistol, but by the interposition of bystanders no mischief was done on either side.

We think the conviction was right. To constitute an assault with a gun, it is not necessary that the person holding it should raise it to his shoulder. The parties here were within shooting distance. The defendant threatened to kill, and the position in which he held his gun was sufficiently threatening. If a man draws a sword or raises a stick at another when within striking distance, it is an assault;

Doan v. Holly.

(Selwyn N. P. 18;) and indeed, according to some ancient authorities, a threat alone, when made to a man's face, has been considered an assault. (2 Roll, 545; 2 Comyn Dig. 257.) A man is not obliged to wait until his adversary draws a bead on him before he commences his self-defence. The fact that the person assaulted in this case was an officer in the execution of his duties, aggravated the offence in the eye of the law and doubtless in the estimation of the jury. Obedience to the mandates of the law is one of the first duties of a good citizen. The first steps towards resistance are dangerous to the peace and security of society, and a ready and cheerful submission to the ministerial officers selected by the constituted authorities is essential to a due administration of justice, and is by no means inconsistent with the most ample redress for any injuries which may be wantonly inflicted under color of official duty.

The other judges concurring, the judgment is affirmed.



DOAN *et al.*, Defendants in Error, v. HOLLY, Plaintiff in Error.

1. Where a judgment is irregularly rendered against the provisions of a statute or the rules of court, the party against whom it is rendered is entitled to have it set aside without showing a meritorious defence to the action.
2. Where a judgment is reversed in the supreme court and the cause remanded to the circuit court, and the mandate of the supreme court is received by the clerk of the circuit court after the commencement of a term of said court and said clerk, of his own motion, docketts the cause on the third day of the term, and the court renders judgment by default on the fourth day of the term; *held*—no rule of the court appearing to have been violated—that the defendant was not entitled as of right to have this judgment set aside without showing a meritorious defence.

Error to Andrew Circuit Court.

This case has heretofore been before the supreme court. (See 25 Mo. 357; 26 Mo. 186.) A former judgment in said cause was reversed at the January term, 1858, of the supreme

Doan v. Holly.

court. The mandate and opinion of the supreme court were received by the clerk of the Andrew circuit court after the commencement of the April term, 1858, of said court. The clerk, of his own motion, docketed the case on the third day of the term. Judgment by default was rendered against defendant Holly on the fourth day of the term. This judgment the defendant Holly moved the court to set aside for the following reasons: 1st, because the court had no jurisdiction of said cause for determination at said April term; 2d, because said cause was not docketed before and at the commencement of said term; 3d, because the cause was entered on the docket the third day of the term without an order of the court authorizing and directing the same to be done.

The court overruled the motion.

Loan, for plaintiff in error.

I. The court had no jurisdiction of the cause. The judgment rendered at the September term, 1857, was a final disposition of the cause in the circuit court. The writ of error removed the whole case to the supreme court. The circuit court could again hold jurisdiction over the cause only by virtue of the mandate of the supreme court, and then only after notice express or implied. In this case the defendant had neither. If the defendant was bound to appear at the April term of the court, he was entitled to the time of the whole term in which to file his answer.

A. H. Vories, for defendants in error.

Scott, Judge, delivered the opinion of the court.

We can not believe that the purposes of justice will be subserved in interfering with the judgment of the court below. It is conceded that where a judgment is irregularly obtained against the provisions of a statute or the rules of a court a party is entitled to have it set aside without showing any merits. It is enough that it was obtained against the

Doan v. Holly.

law or the practice of the court. Unless the court has a discretion in setting the judgment aside, the law must be followed and the judgment pronounced irregular. The circuit courts formerly had rules prescribing the times within which a transcript from the supreme court must be filed before a term, in order to make the cause to which it relates triable at that term. It does not appear from the record that there is any rule on the subject in the court in which this cause was tried. We can find no statute on the subject. We are of opinion that the section of the practice act to which reference has been made does not apply to this case. (R. C. 1855, p. 1289, § 20.) It was not known, when the dockets of the term were made out, whether the former judgment given in the cause had been reversed or affirmed. The clerk then did not know whether any step was to be taken in the cause or not; he therefore could not docket it. The proceedings of the court below appear a little hasty, and, under ordinary circumstances, it would have looked better if a little indulgence had been extended to the defendant; but here is a judgment rendered without violating any statute or rule of practice in a court in which the cause was properly triable. It does not appear that any injustice has been done. The demand is not denied to be due. Although the defendant, at the term at which the judgment now under revision was rendered, might have filed an answer to the merits, he failed to do it. Notwithstanding this, had an affidavit been made showing a meritorious defence to the action, time being asked for to file an answer and prepare for trial, it should have been granted. But as this is the third time that this cause has been in this court, and as it does not appear that there is any just defence to the demand of the plaintiffs, and as the object of the defendant, from any thing that appears, is merely delay, we do not conceive that we would be warranted in interfering with the judgment of the court below. Affirmed. Napton, Judge, concurs.

THE STATE, Defendant in Error, v. YOUNG, Plaintiff in Error.

1. No owner of land over which a road passes can change its location in any other manner than that prescribed by law.
- 2 When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of non-user would, it would seem, be necessary to raise a presumption of abandonment by the public.

Error to Dallas Circuit Court.

This was an indictment for obstructing a public road. The court gave the following instruction at the instance of the prosecution: "If the jury believe from the evidence that before the 1st day of May, 1856, the county court of Dallas county had made an order establishing a county road in the county of Dallas and had directed the same to be opened and described as alleged in said indictment, and that the same had been opened, and that the defendant since the 1st day of May, 1856, and before the finding of this indictment, in the county of Dallas, unnecessarily obstructed said road by erecting a fence across the same, they should find defendant guilty."

The court refused to give the following instruction asked by defendant: "If the jury believe from the evidence that before the fence was made across the road, the travel on the road near the place had changed, and that this new location and not the old road had been worked by the overseer and hands and had thus been kept open and in order, and that both ends of this portion of the old road, where the new road left it and again entered it, had been brushed across, and that the general travel was on this new road before the fence was erected, and the old portion of the road had been abandoned as a travelled road, they will find the defendant not guilty."

The defendant was found guilty and fined ten dollars.

State v. Young.

Wright, for plaintiff in error.

I. The instruction given on the part of the State is erroneous; the second instruction asked by defendant should have been given. (6 Pet. 513.)

Ewing, (attorney general,) for the State, cited Wharton C. L. 806; *Elkins v. State*, 2 Humph. 544; *Corn v. Belding*, 13 Metc. 10; R. C. 1855, p. 1382.

SCOTT, Judge, delivered the opinion of the court.

It is not easy to see how this judgment can be reversed, as there is evidence in the record showing that the defendant obstructed with his fence both the old and the new road. No owner of land over which a road passes has any right to make any change in it but in the manner prescribed by law. Experience shows that the public generally suffers by such changes, and that they are made with an eye to the interest alone of the owner of the land. So far from the change here having been made by authority of law, it seems an attempt was made to effect it, but, for some cause not stated, it did not succeed. Suppose the land which was used as a new road had belonged to another than the defendant, could it have been pretended that the space of five or six years, during which it was used, was evidence of a dedication of the right of way? If it could not be, then the owner not having dedicated his land, he might have enclosed it, and thus the public would have been deprived of a road altogether. When use alone is relied on as evidence of a dedication of a right of way to the public, disconnected with any act of the owner showing an intention to dedicate, it must continue the length of time necessary to bar an action to recover the possession of the land. It would seem to follow that the same length of time would be necessary to raise a presumption of an abandonment by the public of a right of way. (*Missouri Institute of the Blind v. How et al.* 27 Mo. 211.)

Beam v. Link.

There was no evidence, as appears from the record, from which there could arise any question as to the legality of the proceedings in opening the original road. The instruction therefore given for the State contained no error. The facts assumed in the instruction asked by the defendant did not constitute an abandonment of the established road, and therefore that instruction was properly refused.

Affirmed. The other judges concur.



BEAM, Plaintiff in Error, v. LINK *et al.*, Defendants in Error.

1. In an action for a malicious prosecution, in which it was alleged by the plaintiff that the defendants appeared before the grand jury and, without probable cause, &c., caused plaintiff to be indicted for perjury, no grand juror can be permitted to testify and disclose the name of any witness who appeared before said jury.

Error to Polk Circuit Court.

This was an action for malicious prosecution. The petition set forth that defendants knowingly, wilfully, and maliciously went before a certain grand jury and caused and procured plaintiff to be indicted for the crime of perjury, without then and there having probable cause, &c. On the trial, the plaintiff introduced one T. W. Cunningham as a witness, and proposed to prove by him that he was a member of the grand jury that indicted plaintiff; that defendants went before said jury and testified as witnesses before them. The plaintiff disclaimed any intention of eliciting what said witnesses swore to before said jury. The court refused to permit Cunningham to testify.

F. P. Wright, for plaintiff in error.

E. B. Ewing, for defendants in error.

- I. The court properly excluded the testimony of Cunningham. (R. C. 1856, 1169; *Pindle v. Nichols*, 20 Mo. 327;

Beam v. Link.

State v. Baker, 20 Mo. 338 ; 15 Mo. 248 ; Newman v. Lawless 6 Mo. 302 ; Finney v. Allen, 7 Mo. 415 ; Vaux v. Campbell, 8 Mo. 227.)

Scott, Judge, delivered the opinion of the court.

This case is like that of *Tindle v. Nichols*, 20 Mo. 326, in which it was held, that in an action for slander for charging one with having been guilty of perjury in swearing before a grand jury, the grand jurors would not be permitted to testify as to what the plaintiff swore in giving evidence before them. This opinion is founded on the statute, and the statute itself has its origin in principles of the common law. Grand jurors are now and have always been sworn to secrecy. This oath restrained them from disclosing the evidence given before them. The clerk of the grand inquest could not be sworn as a witness in regard to matters that transpired before it. These considerations show that there is no reason in law for relaxing the force of the statute in relation to this subject. The 17th section of the 3d article of the act regulating proceedings in criminal cases (R. C. 1855, p. 1169) enacts that no member of a grand jury shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto. This section will be construed in reference to the 15th, which prescribes the cases in which a grand juror may testify as to the matters that transpired before them. The policy of the law is to encourage witnesses in disclosing offences committed against the state ; and to permit the names of the witnesses to be reported, would as effectually restrain the full discovery of information as to suffer the evidence itself to be disclosed. The case of *Sykes v. Dunbar*, in which Lord Kenyon is said to have held that a grand juror may disclose the name of a witness who testified before the body, has been doubted, and it has been denied that it can be supported on principle. (Starkie, 4th part, p. 908, tit. "Malicious Pros-

Baker v. Mockbee.

ecutions." As to the objection to the instructions, there is none of the evidence preserved in the record, and we can not therefore ascertain whether the plaintiff was injured or not by those that were given.

Affirmed. The other judges concur.

BAKER *et al.*, Respondents, v. MOCKBEE, Appellant.

1. Judgment affirmed because no exceptions were taken to the admission or exclusion of evidence, and no instructions asked, given or refused.

Appeal from Kansas Court of Common Pleas.

Ryland, for appellant.

Pate, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

This case was tried by the court without a jury on appeal from a justice of the peace, and as no exceptions were taken to the admission or exclusion of evidence, and no instructions were asked, given or refused, the record does not present any question of law for the determination of this court.

At the close of the evidence, the defendant moved the court to dismiss the suit because there was no agreement in writing, signed by the defendant, to take the case out of the statute of frauds; but, conceding that the motion ought to be considered as an instruction, it was properly denied, because the evidence left open the question of fact whether the credit was given originally to Caffrey or the defendant; for, though the circumstance that the goods were charged to Caffrey on the plaintiff's books was strong evidence to show that he was the primary debtor, it was not conclusive as a matter of law.

The judgment is affirmed, the other judges concurring.

Altum v. Arnold.—Johnson v. McHenry.

ALTUM, Respondent, v. ARNOLD, Appellant.

1. Where cases commenced since the revised code of 1855 went into effect are tried by the court without a jury, questions of law should be raised by instructions, or declarations of law.

Appeal from Crawford Circuit Court.

Arnold, for appellant.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was commenced since the revised statutes of 1855 took effect, and was tried by the court without instructions, and without raising any questions of law during the progress of the trial. Therefore, according to the settled practice of this court, which has been established by a series of decisions and recognized in several cases at the present term, the judgment must be affirmed. The other judges concur.

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JOHNSON, Defendant in Error, v. McHENRY, Plaintiff in Error.

1. It is not necessary that the petition in a suit (under the mechanic's lien act of 1845, R. C. 1845, p. 735, sec. 7) to enforce a mechanic's lien should contain a prayer for a special execution against the property alleged to be charged with the lien; if the account filed with the petition and referred to therein corresponds with that filed as a lien demand, it sufficiently appears that the object of the suit is the enforcement of the lien.

Error to Greene Circuit Court.

Andrew Johnson furnished materials for and performed work and labor on a house belonging to John McHenry. He filed his lien on the 16th of January, 1855. On the 1st of February he commenced the present suit against said McHenry, in the ordinary form, on an account for materials fur-

Johnson v. McHenry.

nished and work and labor done. The petition contained no prayer for a special execution against the building upon which the labor, &c., had been expended. The petition referred to a bill of items filed therewith. There was also filed with the petition the lien account that had been filed as a lien against said building. The items of this account or statement were the same as those set forth in that referred to in the petition.

The defendant appeared and answered. He withdrew his answer. Judgment by default was then rendered against him at the March term, 1856, and an inquiry of damages awarded. This judgment by default was afterwards set aside, and plaintiff was permitted to file an amended petition which contained a prayer for a special judgment against the property charged with the lien. The court refused to strike out this amended petition. At the September term, 1856, judgment by default was again rendered against defendant, and it was ordered that an execution should issue against the property charged with the lien.

Hendrick, for plaintiff in error.

I. The court erroneously and irregularly suffered the plaintiff to amend his petition. The special judgment also was irregular. Judgment was rendered on the amended petition, which was not filed in time to bind the real estate. Suit must be brought within twelve months. Suit was not brought on the lien in this case until the amended petition was filed.

F. P. Wright, for defendant in error.

I. The defendant having once appeared and answered, it was proper to permit plaintiff to amend his petition. The defendant appeared and moved to strike out the amended petition, and there was no necessity for another service on him. The amended petition was not in the nature of a new suit; it was only designed to make the first petition more definite.

Johnson v. McHenry.

Scott, Judge, delivered the opinion of the court.

The seventh section of the act concerning mechanics' liens provides that whenever any person shall wish to proceed against any property, upon which he shall have a lien, he may commence his suit in the ordinary form, and shall have judgment against the original debtor for the amount that shall be found due him. (R. C. 1845, p. 735.) The practice act of 1849, art. 7, sec. 4, directs that when the items of an account exceed twenty in number, a party may file with his pleading a copy of the account and relieve himself from the burden of setting forth in his pleadings the items composing it. As a person examining the record would see that the account filed with the pleadings and the one filed with the claim for a lien corresponded, he would be sufficiently informed that the suit was for the purpose of enforcing the lien. In the case before us, the petition refers expressly to the account filed along with it. We see no necessity for the amended petition, as the petition showed that its object was to enforce a lien. We do not consider that any special prayer for execution against the property on which the lien had attached was necessary. It may be that another than the debtor is the owner or possessor of the property, in which case a *scire facias* would be necessary before an execution could be issued against the property. After the judgment is rendered for the debt due, then the court determines the course to be afterwards pursued. It will award execution, or refuse it in the event a *scire facias* is necessary.

No point was made in the court below in relation to the item for a coffin. Whether it was a thing for the making of which the law conferred a lien was a question not raised on the trial, and it can not now be raised for the first time in this court.

The same observation may be made respecting the sign-boards. Judge Napton concurring, the judgment is affirmed.

THE STATE, Defendant in Error, v. ANDREWS, Plaintiff in Error.

1. Each act of selling liquor without license is a distinct offence for which the party so doing may be prosecuted by a separate indictment or by different counts in the same indictment; when the defendant pleads that the offence charged against him is the same of which he had been previously convicted, the onus is on him to sustain his plea; it is not sufficient for him to show that the evidence adduced against him would have supported the first indictment because it would have been sustained by proof of any act of selling within twelve months before the finding thereof.
2. In all cases in which a person arraigned upon an indictment does not confess the indictment to be true, a plea of not guilty should be entered, and the same proceedings should be had as if he had formally pleaded not guilty to the indictment. (R. C. 1855, p. 1181, § 5.)

Error to Chariton Circuit Court.

This was an indictment for selling liquor without license. The defendant pleaded a former conviction for the same offence. The cause was tried by the court without a jury. The court found the defendant guilty as charged. The court refused certain declarations of law, the erroneous character of which is apparent from the opinion of the court.

Prewitt, for plaintiff in error, cited Greenl. Ev. § 36; State v. McGrath, 19 Mo. 678; Brown v. King, 10 Mo. 57; R. C. 1855, p. 1181; 11 Mo. 363; State v. Vaughn, 26 Mo. 29; State v. McGee, 8 Mo. 495.)

Ewing, (attorney general,) for the State.

I. The sales of liquor were distinct. Each sale was a distinct offence. (R. C. 1855, p. 683, 686; 11 Vermont, 91; 1 Archbold, 113-4.)

RICHARDSON, Judge, delivered the opinion of the court.

We think that the instructions asked by defendant were properly refused, because they all assume, as a matter of law, that the misdemeanor for which the defendant was on trial

State v. Andrews.

was the same offence for which he had previously been indicted and convicted. Each act of selling is a distinct offence, for which the defendant may be prosecuted by a separate indictment, or by different counts in the same indictment; and when it is pleaded that the offence charged in both indictments is the same, the averment may be established by parol evidence and is to be proved by the defendant. To sustain the plea in this case, it was incumbent on the defendant not only to produce the record of the former conviction, but to show by testimony that he had been previously tried for identically the same offence as the one for which he was then prosecuted; and it was not sufficient to show that the evidence offered on the last trial would have supported the first indictment because it would have been sustained by proof of any act of selling within twelve months before the finding thereof. Whether, therefore, the offences charged in both indictments were the same, was a question of fact; and, though the court on the evidence would have been authorized to have found the issue on the plea for the defendant, the conclusion from the proof ought not to have been announced as a declaration of law.

The judgment, however, must be reversed on a point of practice. The only plea in the record is the plea of *autrefois convict*, and the finding of the court was not responsive to the issue tendered by the plea. It was the duty of the court to have had the plea of not guilty entered, for the statute provides that in all cases when the defendant does not confess the indictment to be true, a plea of not guilty shall be entered and the same proceedings shall be had in all respects as if he had formally pleaded not guilty. (R. C. 1855, p. 1181, § 5; Walder v. State, 11 Mo. 363.)

The judgment will be reversed and the cause remanded. The other judges concur.

STANLEY, Defendant in Error, v. BUNCE, GARNISHEE, Plaintiff in Error.

1. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors that it is the intent of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned and to dispose of the same in the usual course of business until default, such deed of assignment should be held to be a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors.
2. It is not necessary that the deed of assignment should expressly provide that the grantor should remain in possession and continue to dispose of the goods in the usual course of business; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties.

Error to Cooper Court of Common Pleas.

This was a suit by attachment against W. W. Norris. One Harvey Bunce was garnished as having in his hands funds belonging to defendant Norris. Upon the trial of the issue raised as between the plaintiff and the garnishee, the plaintiff adduced in evidence two deeds of trust executed by Norris to Bunce as trustee. Plaintiff contended that these deeds were fraudulent in law on their faces as to creditors. The court ruled that said deeds were fraudulent in law. A verdict was rendered against Bunce, the garnishee.

The character of the deeds is, it is conceived, sufficiently apparent from the opinion of the court.

Adams and Leonard, for plaintiff in error.

I. There is no clause in either deed which reserves any right or benefit to Norris. Norris is divested of all right to the property and of all control over it. He had no right whatever to retain the goods for one moment after the execution of the deeds, and he could not, under the clause with respect to the renewal of the stock or any other, dispose of the goods for his own use or for any purpose whatever. Bunce had the right to take possession immediately under

Stanley v. Bunce.

the deeds, which he accordingly did. (See Page & Bacon v. Gardner, 20 Mo. 508; Milburn v. Waugh, 11 Mo. 369; Brooks v. Wimer, 20 Mo. 503; Walter v. Wimer, 24 Mo. 63; Martin v. Maddox, 24 Mo. 575.)

Douglass and Hayden, for defendant in error.

I. The deeds were made in trust to the use of Norris, and were consequently void. (See 24 Mo. 575; *id.* 63; 20 Mo. 503; 15 Mo. 459; 1 Smith L. C. 59; 4 Comst. 580; Burrill on Assignments, 70-72, 171, 180; 7 Paige, 568; 4 Barb. 546; 10 Watts, 237; 3 Mo. 297.)

NAPTON, Judge, delivered the opinion of the court.

We do not perceive any thing in this case to distinguish it from that of Brooks v. Wimer, 20 Mo. 503, and several other cases deciding the same principle. In this case of Brooks v. Wimer, the grantor conveyed a stock of goods to a trustee for the benefit of certain creditors named, but reserved the right to himself to sell the goods in the usual course of his business until default made in the payment of some debts secured by the deed. This instrument was declared void on its face because of the reservation of the right of disposition without accountability. It was held a conveyance to the use of the person making it within the meaning of the first section of an act concerning fraudulent conveyances. In the case of Walter v. Wimer, 24 Mo. 62, the assignment contained a similar provision, but the grantor also agreed faithfully to apply the proceeds of his sales towards replenishing his stock, and made the new stock thus acquired, as well as the old, subject to the trust. This additional provision was however held to make no difference; the deed was held void.

In the present case the same provision is found, not perhaps *in hæc verba*, but it is just as necessary and natural an inference from its terms as if it had been so declared in the precise language of the deeds referred to in the cases cited. In one of the deeds (they are both substantially

Stanley v. Bunce.

alike) Norris conveys his present stock of goods, and also "all goods, wares and merchandise which the said Norris *may at any time within twelve months purchase for the purpose of renewing or replenishing said stock.*" There is also conveyed all his bonds, notes, accounts, &c., then on hand, and "also all such as *may be created at any time within one year from the date of these presents.*" The condition of this conveyance was, that whereas the beneficiaries were securities for Norris and "had agreed to become the sureties for said Norris *from time to time for the next ensuing one year* not to exceed ten thousand dollars;" then if Norris saved them harmless from these liabilities, already incurred or hereafter incurred, the deed was to be void; but in the event that any of them was compelled to pay any liability incurred in this way, the trustee was authorized to proceed to sell, &c.

The intent of this deed was, that Norris should retain possession of his goods and proceed with his business as a merchant. It was impossible for Norris to renew or replenish a stock of goods under the control and in possession of a trustee. It was equally impossible for him to create new debts, accounts, &c., under such circumstances. The *cestuis que trust* contemplated the probability of being called upon to endorse additional notes in the course of the year and provided for this contingency; all of which could have proceeded on no other supposition except that Norris was to continue his business. The trustee could, on certain contingencies, take possession, just as was provided in the deeds in Brooks v. Wimer, and Walter v. Wimer; but until this contingency happened, he had no right to the possession under the deed, and no creditor outside of the assignment could touch the property. It was completely locked up against all the world, except the creditors named in the assignment and Norris himself, and he could dispose of and make a good title to every dollar of the property. All this appears upon the face of the deeds. It is not a question of fact or intent arising from any thing outside of the deeds, but is the

Blue v. Penniston.

natural, indeed we think the only, interpretation to be put upon the deeds themselves. The case, then, falls within the principle heretofore decided; and the judgment of the circuit court must be affirmed. Judge Scott concurring.

BLUE, Appellant, v. PENNISTON, INTERPLEADER, Respondent.

1. Where a suit is commenced by attachment on a promissory note and a person interpleads claiming the property attached as trustee for the wife of the defendant in the attachment, by virtue of a deed executed and recorded two years before the date of the note sued on, the plaintiff may show that the note sued on was given for a debt that existed before the execution of said deed.
2. The acts of the grantor (the father of the *cestui que trust* in said deed) and her husband (the defendant in the attachment suit) in selling certain of the slaves embraced in said deed, are competent evidence as bearing upon the question of fraud in its execution.

Appeal from Linn Circuit Court.

This was a suit by attachment upon a promissory note executed by John K. Kerr, dated February 20, 1845. A negro woman and her two children were attached as the property of said Kerr. Francis P. Penniston interpleaded, claiming said slaves as trustee for Mrs. Kerr, by virtue of a deed executed by Robert P. Penniston, the father of Mrs. Kerr. This deed was dated February 28, 1843. It was acknowledged and recorded the day of its date, and conveyed certain slaves to said interpleader in trust for the separate use of Mrs. Kerr. Evidence was introduced showing that the slaves embraced in said deed had been in possession of said John K. Kerr for several years before the date of said deed. Evidence was also introduced bearing upon the question whether there had been a gift of said slaves to Mrs. Kerr. The plaintiff offered to show that the note sued on was given for a debt that existed previous to the execution of the said trust deed of R. P. Penniston. The court refused to permit the evidence to be introduced.

Blue v. Penniston.

The court, among other instructions given at the instance of the interpleader, gave the following: "3. The acts of Robert Penniston and John K. Kerr in selling Ellen, one of the slaves mentioned in the deed, are no evidence to invalidate the deed."

The jury rendered a verdict for the interpleader.

Harris, for appellant.

I. The court erred in excluding the evidence offered by plaintiff. He should have been permitted to show that the debt for which the note was given was contracted prior to the execution of the deed of trust. (*James v. Briscoe*, 24 Mo. 504; 4 *McCord*, 232.)

II. The court erred in giving and refusing instructions. (5 Mo. 493; 13 Mo. 67; 24 Mo. 504; 22 Mo. 341; 7 Mo. 249.)

Prewitt, for respondent.

I. It is immaterial whether the debt sued on was created before or after the execution of Penniston's deed. The question in issue was whether the father had given the slaves to his daughter some two or three years before making the deed. The plaintiff should have shown the materiality of the offered testimony. (15 Mo. 244.)

II. The third instruction was correct. The court did not err in giving or refusing instructions. (*R. C.* 803; 16 Mo. 114; 25 Mo. 301; 14 Mo. 354; 25 Mo. 301; *Hill on Trustees*, 419.)

NAPTON, Judge, delivered the opinion of the court.

Upon a more careful examination of the case since the argument, we have not been convinced of the propriety of excluding the testimony offered to show the true date of the plaintiff's debt. The evidence, it is conceded, was competent, and the only ground of its exclusion was irrelevancy. This is rather unsafe ground when the question at issue is one of fraud—a matter about which there is seldom to be

found direct and positive proof. The only question in this case was, whether the deed of Robert Penniston was an after-thought, a contrivance to defraud some creditor or creditors of Kerr. To enable the plaintiff in the attachment to make any headway in establishing this allegation, it would of course be very material for him to show that Kerr was in debt at the time of the execution of the deed. The note upon which suit was brought was dated after the deed, and, without explanation, upon the face of the transaction alone, it would be rather an up-hill labor to convince a jury that a deed made nearly two years before the debt was intended as a fraud upon the creditor. To get a starting point for an attack upon the deed, it was essential for the plaintiff to show that the debt was really due two or three years before the note was given, and this is the evidence which was offered and excluded.

In connection with this point, we may also express our doubts of the propriety of the third instruction which the court gave for the interpleader. In this instruction, the court declared the acts of Robert Penniston and John K. Kerr, in selling certain slaves enumerated in the deed some time after it was executed, were no evidence to invalidate the deed. This instruction virtually excluded the testimony on this point from the jury. Undoubtedly the acts of the father and the husband could not and ought not to affect any vested interest of the wife and daughter; but it will be observed that the question really at issue was, whether Mrs. Kerr had any interest; in other words, whether the deed was *bona fide* and valid, or a mere contrivance to defraud Kerr's creditors. The acts of Kerr and the father, who was the maker of the deed, are introduced to bear on the question, to explain the character of the original transaction. What weight such evidence would have is another question. It may be admitted that by itself it would be entitled to but little; but in questions of this nature—mostly explained by circumstances in themselves perhaps trivial, remote and dis-

Price v. White.

connected, but when combined and brought together capable of tending to as satisfactory conclusions as the most plain and direct evidence—it will not devolve on the court presiding over the trial to exclude each piece of detached evidence, as it is offered, because of its insufficiency or its apparent irrelevancy. It may be that the evidence is so unsatisfactory to the court that a verdict found on it would be set aside; but even this we do not conceive will warrant the judge in excluding it. If it is competent and has a tendency to explain the issue, it ought to be received; and when the whole case is put to the jury and acted on, it will be proper for the court to say whether a verdict based on the evidence will be permitted to stand. With the concurrence of Judge Scott, the judgment is reversed and case remanded.

PRICE, Defendant in Error, v. WHITE, Plaintiff in Error.

1. When an agreement to submit a matter in dispute to arbitration describes the subject of dispute thus: "A matter in difference between the parties;" and the parties afterwards appear before the arbitrators and litigate a matter without any denial that it is the subject of dispute between them, they should not afterwards be heard objecting to the vagueness and indefiniteness of the agreement.
2. Where a notice is given that a motion will be presented to a court on the first Monday of May for the confirmation of an award, and the legislature afterwards changes the time of holding said court from the first to the second Monday, the notice will be sufficient; the party to whom the notice is given must take notice of the change.

Error to Osage Circuit Court.

Barbara Price and George C. White entered into the following agreement to submit a matter in difference between them to arbitration: "Know all men by these presents, that we, Barbara Price and George C. White, both of the county of Osage and state of Missouri, respectively agree to submit a matter now in difference between us to an arbitration, the

Price v. White.

following persons having been selected to arbitrate and make an award accordingly, to-wit: John M. Laughlin, Samuel S. Farrier and John C. Bryant. We, the undersigned, Barbara Price and George C. White, agree in said submission that the award of said arbitrators shall be final, and that the said award [shall be] entered on the docket for the circuit court clerk, and become a judgment at the next term thereof to be holden in said county; this, the 16th day of December, 1856. [Signed] Barbara Price, George C. White."

The arbitrators met and made their awards on the said 16th day of December, 1856. They made two awards, both dated December 16, 1856—one of which was filed in the office of the clerk of the Osage circuit court, January 31, 1857—the other was filed March 2, 1856. They were substantially the same, and were in favor of Barbara Price. At the May term of the Osage circuit court, this award was confirmed on motion of said Barbara Price. White was notified that a motion would be made for the confirmation of said award by the circuit court on the first Monday of May, 1857. When this notice was given does not appear.

Edwards and McCord, for plaintiff in error.

I. Notice that a motion would be made at a court to be held on the first Monday was not such a notice as would authorize the court held on the second Monday to confirm the award. The agreement to submit was too vague. Admitting it to be good, the arbitrators clearly exceeded their authority. The supposed submission authorized the arbitrators to act upon "a matter in difference;" the award proposes to decide three separate and distinct matters in difference. The award is uncertain and void. (R. C. 1855, p. 187, § 13; *Walton v. Walton*, 17 Mo. 396.) The supposed submission does not designate what circuit court should enter judgment on the same.

Muir & Draffin, for defendant in error, cited 9 Mo. 39, 49, 355; 13 Mo. 107; 12 Mo. 161; 8 Mo. 709; 7 Mo. 224; 11 Mo. 358, 623-4; 10 Mo. 459, 515; 4 T. R. 146.

SCOTT, Judge, delivered the opinion of the court.

This was a submission to arbitration entered into in pursuance to the first section of the act in relation to that subject. The statute enumerates the causes for which an award under that section shall be vacated, and directs that unless it is thus vacated it shall be confirmed. None of the steps required by law were taken by the defendant to have the award vacated. The objections to the award were all formal and such as might have been corrected under the 30th section of the act if the party had seen proper to have had it done; but having failed to do so, he will not be permitted now to raise them in this court.

The defendant complains that the agreement for a submission is too vague and indefinite in its description of the subject of dispute, its language being "a matter in difference between the parties," without any thing more showing the subject of the difference. We do not undertake to say what would have been the force of this objection in an action on the agreement to submit in the event there had been a refusal to arbitrate under it. A reference of all matters of difference between the parties is good. The plaintiff and defendant having agreed to submit a matter in difference between them, having appeared before the arbitrators and litigated a matter without any denial that it was the subject of dispute between them, the defendant should not be heard objecting to the bond in this form of proceeding. If the defendant conceived that the award was too vague for his protection from future litigation, the statute pointed out to him a way to have it corrected.

The agreement to submit sufficiently shows that the circuit court of Osage county was the court in which the award was to be entered as a judgment. As the parties represented themselves to be "of Osage county" in the article of submission, in stipulating that the award should be entered as a judgment at the next term of the circuit court in said

county they clearly indicated the court they had in contemplation.

The objection to the notice of the award is not saved. It does not appear when the notice was served, though it is stated that at least fifteen days' notice in writing was given to the defendant. The award was made on the 16th of December, 1856. The acts changing the times of holding courts in Osage county was passed on the 15th day of January, 1857, and took effect immediately after its passage. (Sess. Acts, 1856-7, p. 467.) Now if the notice of the award was served between the 16th of December, 1856, and the 15th day of January following, it was then good; and if the general assembly afterwards changed the time of holding court, the party served with notice should at his peril have taken notice of the change.

It is objected that the court erred in disregarding that portion of the award which directed that the defendant "should winter with *roughness* the cattle of the plaintiff." This act was for the benefit of the plaintiff, and the omission of the court to enforce it was an advantage to the defendant. The plaintiff consented to the action of the court. Nothing is clearer than that an award may be good in part and bad in part, and the bad part may be rejected when it is so unconnected with the residue that it may be seen that its rejection does not affect the justice nor the correctness of that portion of the award which is retained. It sufficiently appears that the part of the award which was disregarded had no such connection with the portion retained that its rejection could possibly affect the defendant in an injurious manner.

The statute does not prescribe the length of time the parties shall be notified before the hearing. As it appears from the award that the defendant appeared before the arbitrators, he could not afterwards object to the want of notice. As he appeared, if the notice was too short, or if he had had none previously, he might have applied for a postponement, which the arbitrators were empowered to grant.

Wadlow v. Perryman's Adm'r.

The fact that the award directed money to be paid and different articles of produce to be delivered to the plaintiff, did not show that there was more than one matter in difference between the parties considered by the arbitrators. There were two awards filed in the clerk's office by the plaintiff. We do not see that there was any substantial difference between them. The one imports no more than the other. If the corn and bacon could not be had, the value of it at the time of the award might have been recovered by an action on the award. The court can compel the performance of the award by attachment. That would, we suppose, be the proper process to compel the performance of so much of the award as relates to the delivery of the produce. If the defendant is too poor to comply and has not the means, that would be a subject of consideration, regard being had to the law which prohibits imprisonment for debt. It was a matter of concern to the plaintiff only, that the court gave the defendant the option of paying in corn and bacon, or its value.

The defendant is not injured by the judgment of the court. He can relieve himself by performing the award as it was originally made. That the court has given him the option of performing the award, or doing something else, is to his advantage, and not to his prejudice. He can not complain. (*Gentry v. Barrett*, 5 J. D. Marshall, 317.)

Affirmed. The other judges concur.

WADLOW, Plaintiff in Error, v. PERRYMAN'S ADMINISTRATOR,
Defendant in Error.

1. In an action on a warranty of soundness of a negro slave, the declarations of such slave with respect to her symptoms, made by her when sick, are competent evidence as bearing upon the question of unsoundness.

Error to Greene Probate and Common Pleas Court.

This was an action on a warranty of soundness of a slave. At the trial, plaintiff offered in evidence the declarations of

Lacy v. Williams.

said negro slave with respect to her symptoms, made when she was sick to those in attendance upon her. The court refused to permit the evidence to be introduced. The plaintiff took a nonsuit, with leave to move to set the same aside.

Hendrick, for plaintiff in error.

I. The court erred in excluding the offered testimony. (Marr v. Hill & Haynes, 10 Mo. 323.)

Price and *Foster*, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

We see no difference between this case and that of Marr v. Hill & Haynes, 10 Mo. 333. The evidence offered by the plaintiff of the declarations of the slave, made whilst she was laboring under sickness, as to the cause of her illness and the source of it, were admissible, and the court erred in excluding them. With the concurrence of the other judges, the judgment is reversed and the cause remanded.

LACY, Plaintiff in Error, v. WILLIAMS, Defendant in Error.

1. The general appellate jurisdiction that the circuit courts exercise over the county courts does not authorize them to try *de novo* causes appealed from the county courts.
2. Generally, the domicile of the parent is the domicile of the minor child.
3. Curators of the estates of minors can not be appointed by the county courts of counties in which such children do not reside.

Error to Polk Circuit Court.

George M. Williams was appointed by the county court of Polk county curator of the estates of three minors, who were and still are under the age of fourteen years. At the time of this appointment said minors resided in Cedar county. They owned land in Polk county. On the motion of their mother, Mrs. Lacy, the county court revoked the appointment of Williams. He appealed to the circuit court. The

Lacy v. Williams.

circuit court, having heard the evidence, vacated the order of the county court displacing Williams, and directed that he be reinstated as curator. It is to obtain a review of this action of the circuit court that Mrs. Lacy brings the cause by writ of error to this court.

F. P. Wright, for plaintiff in error.

I. In a case like the present, there is no appeal to the circuit court. The remedy was by writ of error or mandamus. The minors being residents of Cedar county, the county court of that county had the sole right of appointing curators of their estates. (R. C. 1855, p. 823, § 8, 9.) The mother had the right to be appointed curator.

Freeman, for defendant in error.

I. The county court could not revoke its appointment of Williams as curator without giving him notice. Its attempt to do so was illegal. Mrs. Lacy was a married woman and could not act as curator. (R. C. 1855, p. 822.) Even if the county court committed error in appointing Williams curator, since the plaintiff in error was and still is a married woman she had no power to appear either in the county or the circuit court by attorney without joinder of her husband. An appeal lies from the order of the county court in this case to the circuit court. (R. C. 1855, p. 533, § 8.)

Scott, Judge, delivered the opinion of the court.

The second section of the 14th article of the practice act (R. C. 1855, p. 1295) directs that a writ of error shall issue on the final decision or judgment of the county court from the circuit court. The 4th clause of the 8th section of the act to establish courts of record and prescribe their powers and duties (R. C. 1855, p. 533) gives the circuit court appellate jurisdiction from the judgments and orders of county courts and justices of the peace, in all cases not expressly prohibited by law, and also confers a superintending control over them.

Lacy v. Williams.

Except in a few instances expressly mentioned, the law seems to be silent as to the mode in which the benefit of appeals and writs of error shall be obtained on a judgment or decision rendered in the county court. No method is pointed out as to the manner in which the evidence shall be preserved in the inferior courts for the use of the superior court. A trial *de novo* in the circuit court would not strictly be the exercise of appellate jurisdiction. (The County of St. Louis v. Sparks, 11 Mo. 203.) It is clearly competent for the general assembly to confer such a jurisdiction, but until it is expressly done we do not consider that the bestowal of a mere appellate power would authorize the courts to try causes *de novo*. It is obvious that a writ of error, without the authority to take bills of exceptions on the trial, would in most cases be ineffectual for the attainment of the ends proposed by such a process. Our legislation on this subject is defective, and requires some addition in order to give parties the full benefit of appeals or writs of error on the final decisions of the county courts. Under this state of legislation on this subject, it was held at the last term, in the case of Lewis v. Nuckols, 26 Mo. 278, that an appeal performed nothing more than would be effected by a writ of *certiorari*.

The county court of Polk county had no authority to appoint a curator for children who were not residents of the county. The order of appointment was void and may be treated as a nullity in a collateral proceeding. Regularly, the domicile of the parents is that of their children, and whilst the mother was a resident of Cedar county, a curator for her children could not be appointed by the county court of Polk county. This is the only safe rule, and the only one that will prevent confusion and conflict in the administration of the estates of minors. If one county court, because the minor has land in the county, may appoint a curator for him, so may every court where there is land in the county belonging to the minor, and so there would be many curators for the same child, and no subordination nor concert among them, nor

Thomson v. Roatcap.

any means of enforcing it. (Ludlow's heirs v. McBride, 3 Ohio, 240; Maxom v. Sawyer, 12 Ohio, 206.)

For the reasons stated in the preceding part of this opinion, this cause will be dismissed, leaving the judgment of the county court rescinding the order appointing the curator in full force. The other judges concur.



THOMSON, Plaintiff in Error, v. ROATCAP, Defendant in Error.

1. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof.

Error to Cooper Court of Common Pleas.

This was an action on the following promissory note: "\$77.50. Twelve months after date, I promise to pay Wm. W. Norris seventy-seven dollars and fifty cents, without discount or defalcation, for value received, this 1st day of October, 1856. [Signed] John Roatcap."

The defendant denied knowledge of the alleged assignment of said note by Norris to plaintiff, and alleged that on the first of August, 1857, before said note became due, and before the time of the alleged assignment, he paid to Norris on said note the sum of \$75, which he, Norris, agreed should be in full satisfaction of said note.

It appeared in evidence that on the first of August, 1857, defendant paid Norris seventy-five dollars on account of said note and took Norris' receipt; that on the 9th of September, 1857, plaintiff purchased said note of Norris in good faith without any knowledge of the payment by defendant thereon. The court, at the request of defendant, gave the following declarations of law: "If defendant paid to Norris the sum

Thomson v. Roatcap.

of seventy-five dollars on said note before the assignment of said note, and Norris agreed to accept the same in full satisfaction of said note, then the defendant is entitled to a verdict, and if seventy-five dollars was paid only as a credit plaintiff is entitled to a verdict for balance. 2. The court declares the law to be that the payer of a non-negotiable note may, before notice of the assignment of said note, pay the amount of the same to the payee, and thereby protect himself against a recovery by the assignee. 3. The court declares the law to be, that if the defendant paid the sum of seventy-five dollars on said note before the same was due, and the payee accepted the said amount as a full satisfaction of said note, then said payment amounts to an accord and satisfaction, and the defendant is entitled to a verdict."

The court rendered judgment for plaintiff for the balance due after allowing a credit of seventy-five dollars upon the note.

Stephens & Vest, for plaintiff in error.

I. The court erred in refusing the declarations of law asked by plaintiff. (*Odell v. Gray*, 15 Mo. 337; R. C. 1855, 1290; Chitt. on Bills, 266; Sto. on Notes, § 191, 192; Sto. on Bills, § 188; *Smith v. Ashley*, 20 Mo. 354.) The court erred in giving the instructions asked by defendant. (*Ib.*)

Hutchison, for defendant in error.

I. The court properly declared the law of the case. The defendant was entitled to a credit for the amount paid on the note previous to the assignment. (R. C. 1855, p. 322, § 3; *id.* p. 1026, § 20.) The note sued on was not negotiable under the statute; nor is it a negotiable note at common law.

RICHARDSON, Judge, delivered the opinion of the court.

The instrument sued on in this case is a note within the description of the first section of the act concerning bonds and notes; (R. C. 1855, p. 319;) and by the second section

Thomson v. Roatcap.

is made assignable, so that the assignee can maintain an action thereon in his own name against the maker, in like manner as the payee could have done. But it is not a negotiable note within the meaning of the 15th section of the act concerning bills of exchange, for the effective words to give it that character, viz., "for value received, negotiable and payable without defalcation," are omitted, and therefore it has not the same effect as an inland bill of exchange. This note then stands on the same footing of an ordinary promissory note, transferable, but not negotiable; and the assignment of it to the plaintiff did not defeat any defence which the maker had at the time of the assignment against the payee, for the third section of the act first mentioned declares that "the obligor or maker shall be allowed every just set-off or other defence against the assignee and the assignor existing at the time of or before notice of the assignment, unless it shall be expressed in the bond or note that the same is for value received, negotiable and payable without defalcation;" and the fifth section provides that the assignee shall not obtain any greater title to, or interest in, any bond or note than the person had from whom he acquired it.

It will be observed that there is a difference in the provisions of the revised acts of 1845 and 1855 on the same subject, and that the third section of the act of 1855 is a substitute for the third and fourth sections of the act of 1845. By the third section of the old law, a set-off against the assignor before the assignment was not allowed if it was expressed in the note or bond that the sum therein specified should be paid without defalcation or discount; but a note or bond under the present statute must contain other words, "for value received, negotiable and payable without defalcation," to prevent the maker from pleading a set-off against the assignor existing at the time or before notice of the assignment.

The payment in this case was made before the note was assigned, and the right to set up that defence was not im-

Hayden v. Stewart.

paired by the assignment of the plaintiff, for he acquired no greater interest in the note than the person had from whom he acquired it, and he took it subject to all the defences which the maker had against the payee at the time of the assignment. The judgment will be affirmed, the other judges concurring.

HAYDEN, Defendant in Error, v. STEWART *et al.*, Plaintiffs in Error.

1. Where, in an action of ejectment, the person from or through whom the defendant claims title to the premises has, on motion of the defendant, been made a co-defendant, the plaintiff is not entitled to dismiss the suit as to such co-defendant.
2. Under the practice act of 1849 an equitable defence might be made to an action of ejectment.

Error to Dade Circuit Court.

This was an action in the nature of an action of ejectment to recover possession of certain premises in the county of Polk. The action was commenced in the year 1852, in the Polk circuit court. On motion of Stewart, the original defendant, one Toler, through whom he claimed title, was made a co-defendant. Toler and Stewart filed a joint answer (which was verified by the affidavit of Toler alone,) putting in issue the allegations of the petition, and setting up that a certain mortgage and lease executed by Toler, through which plaintiff claimed a right to the possession of the premises in controversy, was obtained from said Toler by fraud on the part of plaintiff. The court, on motion, struck out this equitable defence. The cause was then taken by change of venue to the Dade circuit court, which reinstated that portion of the answer stricken out. On motion of the plaintiff, the court vacated the order of the Polk circuit court substituting Toler as co-defendant, and permitted plaintiff to

Hayden v. Stewart.

dismiss the case as to Toler. The court refused to permit Stewart to file a separate answer, and gave judgment against him, disregarding the joint answer that had been put in by Toler and Stewart.

F. P. Wright, for plaintiffs in error.

I. The circuit court of Polk erred in striking out that part of the answer which set up fraud and which constituted an equitable defence. (See *Tibeau v. Tibeau*, 19 Mo. 98.) The circuit court of Dade county erred in setting aside the order of the Polk circuit court making Toler a co-defendant; also in striking out the answer of Stewart, and also in rendering judgment for the want of an answer after the same was stricken out. The affidavit of his co-defendant was sufficient. (*Huntington v. House*, 22 Mo. 365.) By leave of a previous court the answer had been further verified by Stewart's attorney. Stewart should have been permitted to file a new answer instantanly, as he requested.

Gardenhire, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

No opinion of the merits of this case can be drawn from the record, as it appears to have been determined upon points entirely technical. After Toler was admitted as a co-defendant and the joint answer of the two defendants was filed, all the subsequent proceedings consisted of motions to strike out or to reinstate the answer, or to file a new one. The result was, after a varied course on these motions arising from a difference of opinion in several judges before whom the case accidentally came for trial, that the plaintiff dismissed as to Toler, took a judgment by default against Stewart, his answer having been stricken out or not being regarded as his answer because not sworn to by him, and a general judgment finally given for the plaintiff.

The plaintiff had no right to dismiss as to Toler after Toler had been admitted as a co-defendant by the court.

Simpson v. Simpson.

Such a practice would enable a tenant to let his landlord's possession pass over to a stranger, when the landlord, if permitted to be heard, could make a full defence.

It is not to be inferred from the record that it was the intention of the court to pass upon the sufficiency of the answer, since the plaintiff got rid of the answer, so far as Toler was concerned, by dismissing. It may be well enough, however, to state our opinion that the answer was a legitimate one. The plaintiff's title was derived solely from a mortgage executed by Toler, and the answer substantially averred that this mortgage was obtained by false and fraudulent pretences, and was therefore void; or, if it was honestly procured at the time, it had at all events been paid off. In either event, it is clear that the plaintiff had no title, and it can not be doubted that, since the practice act of 1849, an equitable defence may be made to an action which before that statute would have been called an action of ejectment.

The fact that Toler had sold his interest to Stewart did not affect the question to be tried. The plaintiff in ejectment can only recover upon the strength of his own title, and if the mortgage had been extinguished, as asserted in the answer, or was fraudulently obtained and therefore void, it was not material how matters stood between Toler and Stewart. The fifth section of an act concerning ejectment authorizes the court to allow the person through whom the defendant claims title to be made a co-defendant.

The judgment will be reversed and the cause remanded.

SIMPSON *et al.*, Defendants in Error, v. SIMPSON *et al.*, Plaintiffs in Error.

1. Every person who shall sign a testator's name to a will by his direction must subscribe his own name as a witness and state that he subscribed the testator's name at his request; if he does not so state, the will is void.

Simpson v. Simpson.

Error to Carroll Circuit Court.

This was a proceeding instituted to contest the validity of the will of one John Simpson. Said will was admitted to probate in the year 1853.

The testimonium clause of the alleged will, together with the attestation thereof, are as follows: "In witness whereof I have hereunto affixed my signature and seal this 12th day of July, in the year of our Lord 1852. John X Simpson. Signed and sealed in the presence of the undersigned, who were requested to witness the same by John Simpson on this the 12th day of July, 1852. Harden Rodgers, Dudley Thomas, subscribing witnesses."

The court set aside the will and declared it null and void.

Troxell, for plaintiffs in error.

I. The attestation was good under the fourth section of the act of 1845. The signing of the testator's full name to said instrument by his direction did not, under the circumstances of this case, render it necessary to have the same attested according to the requisitions of the fifth section of the act. The act of Simpson in publishing said instrument after his mark and name had been put thereto was sufficient to constitute said instrument his will without any regard to the name written thereto. (19 Mo. 609; 1 Jarm. on Wills, 118; R. C. 1845, p. 1079, § 4, 5.)

E. B. Ewing, for defendants in error.

I. The attesting witness failed to state that he subscribed the testator's name at his request. (R. C. 1845, p. 1097; *McGee v. Porter*, 14 Mo. 613; *St. Louis Hospital Association v. Williams' Adm'r*, 19 Mo. 611; *Northcutt v. Northcutt*, 20 Mo. 268.)

NAPTON, Judge, delivered the opinion of the court.

This case presents the same point decided by this court in *McGee and others v. Porter*, 14 Mo. 613, and *Northcutt v.*

Vaughn v. Locke.

Northcutt et al., 20 Mo. 268. It will be observed that in the recent revision, the fifth section of the act concerning wills, which gave rise to the question decided in these cases, is omitted, and the same question will not arise under the new code. Upon a re-examination of the subject, the court have not been able to arrive at any different construction of the old statute than the one heretofore adopted in cases referred to and others. The judgment of the circuit court is therefore affirmed.

VAUGHN, Respondent, v. LOCKE, Appellant.

1. Where a landlord seeks, under the act concerning landlords and tenants (R. C. 1855, p. 1016-17), to recover possession of the demised premises, the statement filed by him before the justice of the peace must set forth the amount of rent actually due to such landlord, and that the same has been demanded from the tenant.
2. Where one purchasing the demised premises of the landlord seeks to recover possession of them under the 38th section of said act, his statement of the amount of rent due and demanded should embrace only that which is due to himself, and not that which is due to his vendor.

Appeal from Buchanan Court of Common Pleas.

This was an action under the landlord and tenant act to recover possession of certain lots in the city of St. Joseph. The statement filed with the justice of the peace is substantially as follows: That on the 7th of August, 1856, one G. W. Goode, being then the owner of certain lots and buildings in the city of St. Joseph, rented the same to defendant for one year at the yearly rent of ninety dollars; that on the 20th of April, 1857, Goode conveyed said premises to plaintiff, of which fact defendant had due notice; that defendant accepted plaintiff as his landlord and promised to pay plaintiff the rent for said premises; that defendant is still in the occupation and possession of said premises, and has so occupied the same after the expiration of said year without any

Vaughn v. Locke.

new contract, thus becoming by operation of law a tenant of plaintiff for one year from August 7, 1857, upon the same terms and conditions as the preceding year; that there is now due from defendant, as rent for said premises, the sum of \$112.50; that the same has been demanded of defendant, but to pay said amount, or any part thereof, defendant has wholly failed and refused. Plaintiff therefore prays that he recover possession of said lots, &c., in accordance with the statutes in such case made and provided.

This statement was filed with the justice of the peace January 16, 1858. The following account accompanied the statement or complaint: "P. B. Locke to Alfred J. Vaughn, jr., Dr. Jan. 8, 1858. For rent of lots 1, 2, 3, 4, 5 and 6, in Block 44, 'Robidoux Addition,' from August 7, 1856, to November 7, 1857—15 months—at \$90 per annum—\$112.50."

The justice awarded restitution of the premises to the plaintiff. On appeal, the Buchanan court of common pleas rendered judgment in favor of plaintiff.

Ryland, Edwards, Ewing and Locke, for appellant.

The complaint was not sufficient to warrant the finding by the court for the plaintiff. (1 How. 211; 2 Comst. 141; 7 East, 363; R. C. 1855, p. 1016, 1018, § 35; *Evans v. Miller*, 25 Mo. 175; *Ridgley v. Stillwell*, 25 Mo. 570.)

NAPTON, Judge, delivered the opinion of the court.

This proceeding was commenced under certain provisions introduced into the recent revision of the law concerning landlords and tenants. These provisions will be found at pages 1016, 1017 and 1018 of the revised code of 1855, including sections numbered from 32 to 40. The first six sections are transcribed from a local act, found in the appendix of the revised code of 1845, applicable only to St. Louis county, and the three last sections are copied from the act of 1849, which was amendatory of the first mentioned law.

Vaughn v. Locke.

The sections relative to purchasers of leased property are ambiguous in phraseology and make no provision for an apportionment of the rent when a sale is made in the intermediate time between the two periods when the rent becomes due. At the common law, as rent follows the reversion or ownership of the land, no apportionment would be made, but the monthly, quarterly or annual rent would follow the land and belong to the owner at the time it accrues. But it is not mentioned in this case how this question is determined. Two quarters' rent were due to Goode (the original lessor) before the purchase was made by the plaintiff, and would no more pass with the land than any other personal claim of the lessor against the lessee. It is not to be inferred from the language of the 38th section that in extending to a purchaser of rented property the remedies previously given to the original lessor for getting possession of the rented premises, it was intended that the statement required of the amount of rent due should embrace not only what was due to the party complaining, but to his assignor or vendor. It will be observed that no judgment is given for the rent, but merely for the possession. The exact amount of rent due is required to be stated, not because that will affect the judgment either way, but because the tenant is permitted, upon a demand of the sum actually due him, to avoid the suit entirely by paying the demand, and may also, after the suit is brought and at the hearing before the justice, come forward and pay up the rent and costs, and still retain possession of the premises. In this view of the statute, it is plain how important it is that the plaintiff should state the amount really due, for the amount stated must be the amount previously demanded; and when a greater amount has been demanded than is really due, the tenant can in no way avoid the suit and its costs without paying the sum thus claimed. If the construction of the circuit court be sustained, then, if upon trial the plaintiff is entitled to possession, however much the sum demanded may vary from the sum found to be actually due, the tenant is deprived of his privilege of paying up the

Bain v. Chrisman.

demand before suit. This was not the intention of the act, and it is not a compliance with its provisions to demand a larger sum than is actually due.

Judgment reversed. The other judges concur.



BAIN & WYATT, Plaintiffs in Error, v. CHRISMAN & PORTER,
Defendants in Error.

1. Every execution must be founded on a legal judgment.
2. Where a justice of the peace, in the case of separate suits by different parties against the same person, improperly renders a joint judgment in favor of the two separate plaintiffs, and certifies the same as a single judgment to the circuit court, any execution or other proceeding instituted thereon should be quashed and set aside.
3. To entitle a garnishee to indemnification for expenses incurred by him, it is not necessary that he should appear *and answer* in the garnishment proceeding.

Error to Moniteau Circuit Court.

The facts of this case would appear to be substantially as follows: Jacob Bain and J. L. Wyatt instituted separate attachment suits before a justice of the peace against one Farmer. One Chrisman was summoned as garnishee in said suits, and judgments were rendered against him. These judgments the justice seems to have consolidated into one judgment in favor of Bain and Wyatt. He certified the same to the circuit court as a joint judgment against Chrisman in favor of Bain and Wyatt. An execution issued from the office of the clerk of the circuit court against said Chrisman. One Porter was summoned as garnishee. Chrisman and Porter moved the court, separately and jointly, to quash the execution, and to dismiss the garnishment and attachment of Porter. Porter also prayed to be allowed reasonable attorney's fees, &c. The court sustained the motions and rendered judgment against Bain and Wyatt in favor of Porter for ten dollars for his costs and attorney's fees.

White, for plaintiffs in error.

I. The court erred in sustaining the motion of Chrisman to quash the execution. He was not prejudiced by the justice's entering a single judgment in favor of Bain and Wyatt. (R. C. 1855, p. 162, § 18; Rutherford v. Wimer, 3 Mo. 11; Franse v. Owens, 25 Mo. 334; 10 Mo. 304.) It was not for Porter to come in as a debtor of Chrisman and insist that the proceedings between the plaintiffs and Chrisman were irregular. A garnishee can only answer when brought into court. The court erred in allowing an attorney's fee when the garnishee did not answer.

Douglass & Hayden, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

It would seem to be a vain undertaking to attempt to support such proceedings as are contained in the record before us. Two plaintiffs by separate actions—there being no privity whatever between them—obtained separate judgments against the same garnishee. Afterwards a transcript of these judgments is filed in the clerk's office of the circuit court. This transcript is made out in such way as makes it appear that the two separate plaintiffs had obtained a joint judgment in their joint names against the garnishee. This transcript is made the foundation of an execution against the garnishee, on whose motion it was quashed. Nothing can more clearly vindicate the action of the court below in setting the execution aside than the bare statement of the case. Every execution must be founded on a legal judgment, with which it must correspond. As the law provided no remedy against a false transcript filed in the clerk's office of the circuit court, the only course open to the defendant was a motion to set aside the execution, a power inherent in all courts of record. It is a little surprising that the plaintiffs, when they discovered the gross irregularity of their proceedings, did not arrest them and have the proper transcripts filed on

Bain v. Chrisman.

which regular executions might have been issued. The court, under the circumstances, had no authority to make an amendment; and had one been ordered, it could not have been made to correspond with the execution, so that the plaintiffs were necessarily denied the benefit of their irregular proceedings. As the execution was properly quashed at the instance of the garnishee against whom it was issued, it is unnecessary to inquire whether Porter, the garnishee, summoned under the writ, could make such a motion.

The sixth section of the law concerning executions provides that the service of a garnishment under an execution, and the subsequent proceedings against and in behalf of the garnishee, shall be the same as in the case of garnishment under an attachment. The 74th section of the act concerning attachments provides, that, in the event the plaintiff shall fail to recover judgment against the garnishee, the costs shall be adjudged against him, and that the court shall render judgment in favor of the garnishee for a sum sufficient to indemnify him for his time and expenses and reasonable attorney's fees in attending and answering and defending in subsequent proceedings as garnishee. This will certainly be taken distributively. The garnishee will not be required to attend, answer and defend before he entitles himself to the benefit of this section. If time is lost and expenses incurred in consequence of the summons, it is reasonable that the garnishee should be proportionally indemnified, though he may not have answered, or although the prior termination of the cause may have rendered an answer unnecessary.

Affirmed; the other judges concur.

Byrne v. Steamboat St. Mary.

BYRNE, Appellant, v. STEAMBOAT ST. MARY, Respondent.*

1. Where a complaint filed against a steamboat to enforce a lien for wages states "that thirty days have not elapsed since the demand for services accrued to him," and is accompanied by an affidavit to the effect that the demand sought to be enforced "is the only demand that he [complainant] has against said steamboat;" such complaint is sufficient.

Appeal from Buchanan Court of Common Pleas.

This was an action to enforce against the steamboat St. Mary a lien for the payment of wages alleged to be due the plaintiff. The complaint against the boat is as follows: "James Byrne, the plaintiff in the above entitled cause, complains and says that he has a demand against the said steamboat amounting to twenty dollars, for fourteen days' services of him, the said James Byrne, on board the said steamboat, on account of S. G. Cable, the master thereof, in navigating the waters of this state. Steamboat St. Mary, to James Byrne, Dr. To fourteen days' services as deck hand on said steamboat, from the 6th day of April, 1857, to April 22d, 1857, at the rate of \$40 per month. And the said plaintiff says that thirty days have not elapsed since the demand for the services accrued to him as above stated." The complaint was verified, as follows: "James Byrne being duly sworn [says] that the matters contained in the foregoing complaint are true, and that this is the only demand that he has against said steamboat. [Signed] James Byrne. Sworn to and subscribed this 22d day of April, 1857. Alfred Christy, J. P."

On appeal, the circuit court dismissed the complaint.

Locke, Edwards and Ewing, for appellant.

Gardenhire, for respondent.

* This case was decided at the January term, 1858, of the supreme court.

Byrne v. Steamboat St. Mary.

NAPTON, Judge, delivered the opinion of the court.

We have not been able to perceive any objections to the form or substance of the complaint in this case. We have been referred to the 41st section of the act; (1 R. C. 1855, p. 313;) but every requirement of that section, as well as of section 29, seems to have been complied with.

Judgment reversed and cause remanded; the other judges concurring.

[END OF JULY TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

OCTOBER TERM, 1858, AT ST. LOUIS.

SMITH, Respondent, v. DAVIS, Appellant.

1. In a suit for partition commenced by suing out a writ of summons against the defendants upon a petition filed in the proper clerk's office, the writ of summons should be served upon the minor defendants; it is not necessary, in such cases, to serve such writ upon the guardian of such minor defendants.
2. A suit for partition is not triable, except by consent of parties, at the term at which the defendant is first bound to appear.

Appeal from Ralls Circuit Court.

Dryden and Allen, for appellant.

I. The judgment of the circuit court was final and absolute unless reversed on appeal or writ of error. (6 Peters, 729; 1 Peters, 340; 2 Peters, 169; 11 Mass. 226.) The parties to the partition can not have the judgment set aside on this motion. The judgment was rendered at the instance of the plaintiff. The defendants were duly and properly rep-

Smith v. Davis.

resented by their guardian. (18 Mo. 461 ; 8 Mo. 257.) The judgment or order of sale and sale itself were all duly and properly made. The court had full power to appoint a *guardian ad litem*, although the defendants had a general guardian. The act of the guardian bound them. (18 Mo. 461 ; R. C. 1855, p. 1279 ; 11 Mo. 243.)

Carr, for respondent.

I. The order of sale was irregularly made at the return term. (Doan v. Holly, 26 Mo. 186 ; 10 Mo. 454 ; 6 Mo. 388 ; 20 Mo. 432 ; 26 Mo. 505 ; 3 Black. Comm. 404.) There being an irregularity, the court was authorized to set aside the sale. (3 Wend. 478 ; 4 Wend. 217 ; 10 Wend. 568 ; 1 Wend. 71 ; 6 Wend. 526 ; 3 Duer, 652.) It was an irregularity not to make the general guardian and curator of the minors a party to the suit.

RICHARDSON, Judge, delivered the opinion of the court.

On the 6th of November, 1855, Sarah A. Smith commenced a suit for the partition of a quarter section of land against John W. and Enoch A. Smith, both of whom were minors. The summons was returnable to the following March term of the court, and was personally served on the defendants in January. At the return term, in March, 1856, a *guardian ad litem* was appointed for the infant defendants, who was duly qualified, and filed an answer putting in issue the allegations of the petition ; and, the cause being submitted to the court upon the petition, answer and proofs, it was found by the court that the plaintiff and defendants owned the land as tenants in common, in equal parts, and, it appearing that the land could not be divided without great prejudice to the owners, a final judgment was rendered, which directed that the premises should be sold by the sheriff. At the next term in August, the land was sold by the sheriff in the manner and on the terms directed by the judgment, and was purchased by the defendant. One year after the sale, the

plaintiff and the said infants, by their guardian and curator, united in a motion against the purchaser asking to have the sale set aside, and the motion coming on to be heard was sustained. It was admitted that the minors had a regular guardian and curator at the time of the commencement of the suit. The order of the circuit court setting aside the sale is defended on the ground that the judgment is irregular for two reasons: first, because the guardian of the infants was not made a party to the suit, nor served with notice; and next, because final judgment was rendered at the return term of the summons.

This suit was begun before the revised statutes of 1855 took effect, but, as all the provisions of the partition acts of 1845 and the amendment thereto of 1847, that affect this case, are substantially incorporated into the present law, the plaintiff's objections will be considered in reference to the provisions of the existing statutes. Suits for partition may be commenced either by serving a notice with a copy of the petition as prescribed by the sixth section of the partition law, or by filing the petition in the office of the clerk of the proper county and suing out thereon a writ of summons against the defendants as directed by the eighth section. If the first mode is adopted, a copy of the petition, "with notice that the same will be presented to the court on some certain day in the term or as soon thereafter as a hearing can be had, shall be served at least twenty days previous to such term on all parties interested in the lands or tenements who shall not have joined in the petition, and *on the guardians of such as are minors, or of unsound mind.*" (Sec. 6.) But if the other mode is adopted, the writ of summons only goes against the defendants, "which shall be in manner and form, and be served and returned in like time and manner, as writs in ordinary civil actions." (Sec. 8.) Turning to the third article of practice in civil cases (p. 1219) which regulates proceedings by and against infants, it will be observed that an infant is sued like any other person, and that his infancy is not noticed, nor is his guardian, until the pro-

Smith v. Davis.

cess is served upon him, and then the suit is not prosecuted any farther until a guardian is appointed." (Sec. 8.) The appointment (sec. 9) must be made by the court upon the request of the defendant before any answer is filed; but (sec. 10) if the infant defendant neglects, for one day after the first day of the term at which he is bound to appear, to procure the appointment of a guardian, the court shall appoint some competent person to act in that capacity. If then the proceeding is by notice under the sixth section, and the infant is a defendant, service thereof must be made on the guardian; but if by summons under the eighth section, the guardian is not noticed. If the infant has no guardian, provision is made in the 52d section for the appointment of one, in which it is declared, "It shall be lawful for said court, for any of the purposes intended by this act, and before or after any proceeding by virtue thereof, to appoint a guardian for any minor, whether such minor resides in or out of this state; and such guardian, for all the purposes of this act, shall have the same power as any general guardian." There is of course no necessity for the exercise of the authority conferred upon the court by this section, if the infant has a guardian and the proceeding is by notice; and the court is not required, in the appointment of a guardian to defend a suit commenced in the ordinary way, to select the general guardian, if there be one; though it is generally better for the interest of the infant that it should be done, for it is reasonable to suppose that a general guardian will feel more concern for his ward than a stranger would.

By the 12th section, all pleadings and proceedings under the act, except as otherwise provided, shall be had as in ordinary civil actions, and it seems that a suit for partition is not triable by law at an earlier day than ordinary civil actions. Suits founded on bonds, bills or notes for the direct payment of money or property are triable at the term at which the defendant is bound to appear, but every other suit is not triable, except by consent of the parties, until the term thereafter; (R. C. 1855, p. 1259, sec. 5;) and this

Thornton v. Thornton.

suit was not for trial at the return term except by consent of the parties. The guardian *ad litem* had authority to consent for his wards that the case should be tried at the first term; (R. C. 1855, p. 1119, sec. 51; *Hite v. Thompson*, 18 Mo. 461;) and we think it appears from the record that the submission was by the consent of the parties. The suggestion by the plaintiff's counsel that the defendants were minors, the appointment of the guardian, his acceptance and appearance, the filing of his answer, the submission of the cause to the court, and the judgment, are all in one entry and seem to have been contemporaneous; and the fair inference from the entry is that the guardian was present in court, and that on the filing of his answer, by consent of parties, the cause was submitted and tried.

Judge Napton concurring, the judgment setting aside the order of sale will be reversed. Judge Scott being indisposed did not sit.

THORNTON *et al.*, Plaintiffs in Error, v. THORNTON, Defendant in Error.

1. Infants may be made parties plaintiff in statutory proceedings for partition. (*Johnson v. Noble*, 24 Mo. 252, overruled.)
2. Infants can not appear by attorney; they may appear by guardian.
3. An interlocutory judgment in an action for partition, ascertaining the rights of the parties and appointing commissioners, &c., can not regularly be rendered, without the consent of the defendant, at the first term at which he is bound to appear.

Error to Washington Circuit Court.

Frissell, for plaintiffs in error.

I. A sale in an entire thing. If void or voidable in part, it is void or voidable as a whole. The judgment is irregular and void as to the infants and Brunk and wife, for the reason that they were not in fact parties before the court. The judgment then is void, and the sale under it a nullity. (11

Thornton v. Thornton.

N. H. 299; Hall v. Williams, 6 Pick. 247; 12 Johns. 434; 5 Wend. 161.)

T. C. Johnson, for defendant in error.

I. The circuit court could not set aside the sale on a mere motion, except for causes originating after the judgment, such as the misconduct of the sheriff, or unlawful combination of purchasers. Even then a purchaser would not be affected unless he was cognizant of the official misconduct or participated in the combination. (*Neal v. Stone*, 20 Mo. 294.) The purchasers are not affected by the motion unless they had notice of it. The record does not show such a notice. (16 Mo. 173.) The want of authority in the attorney to use Brunk's name and the infancy of five of the petitioners can not be urged against the sale. At most they would make the judgment erroneous. The sale would still be good. The court therefore should have overruled the motion to set aside the sale. The judgment is, however, good and valid and ought not to be disturbed. The suggestion of Brunk by affidavit that his name was signed to the petition without his knowledge or consent, is not sufficient to authorize the court to disturb the judgment. There is no irregularity in the joinder of the infants as parties plaintiff.

RICHARDSON, Judge, delivered the opinion of the court.

This was a proceeding for partition of real estate between the widow and representatives of John Thornton, deceased, commenced in December, 1854. The petition begins—"To the honorable circuit court of Washington county: Your petitioners, John Thornton, Jackson Thornton, John Jennings and Catherine his wife, John Brunk and Mary his wife, Mary Thornton, Thomas Hopson, Catharine Hopson his wife, and James Thornton, Elizabeth Thornton, Cynthia Thornton, Margaret Thornton and Daniel Thornton, by their guardian—the five last named being minors, under twenty-one years of age—say that they are the owners in common and in fee with Joseph Thornton, who is absent in California

Thornton v. Thornton.

and does not join in the petition," &c. ; but the name of the guardian of the infants is nowhere stated, and it does not appear that they had any. The petition purports to be signed by the adult parties, but it is not signed by the attorney, nor by the infants, nor by their guardian, nor any other person for them. The affidavit is made by Mr. Perryman, as attorney for the petitioners, and there is endorsed on the petition a memorandum signed by him that he consented to act as next friend for the minors ; but it nowhere appears that his appointment as such was ever requested, or that he was ever appointed by any court or officer. The record states that an order of publication, which had been previously made, was duly proved, and at the April term of the court, 1855—which we suppose was the first term after the petition had been filed—there was a judgment ascertaining the rights of the parties and appointing commissioners. At the following October term, the commissioners made a report which resulted in an order of sale, and at the April term, 1856, the land was sold by the sheriff, pursuant to the order, for one-tenth of the purchase money in hand and the residue on a credit of twelve months ; and at the ensuing term in October, Brunk, one of the parties, whose name appears to the petition, filed his motion, supported by his affidavit, to set aside the sale made at the previous term, because his name had been signed to the petition without his knowledge or consent, and he had no notice of the proceedings, and also because the infants, who are represented as appearing by guardian, had no guardian in fact. The court set aside the sale as to the interest of Brunk and his wife and the minors, and overruled the motion as to the other parties.

It is not shown that the purchasers had notice of the motion to set aside the sale ; but notice to them was not necessary, as the irregularities in the proceedings were such as affected the validity of the judgment ; and as their title would have been insecure, perhaps, even in a collateral proceeding, it was to their interest, before the purchase money was paid, that the sale, as to all the parties, should be set aside.

We think it is no objection that the infants were joined as plaintiffs; but they could not appear by attorney, and they did not appear by guardian or next friend. The petition is not signed by them or by any person in any capacity whatever for them, and they only appear as parties to the proceedings by the caption to the petition. Infants can only sue by guardian or next friend; and if these infants had no guardian, one could have been appointed for them before the commencement of the suit, under the ample provisions of the statute for that purpose; (R. C. 1845, tit. Partition, sec. 54;) and the endorsement by Mr. Perryman on the petition that he consented to act as their next friend amounted to nothing.

It was also irregular to try the case at the first term of the court at which the defendant was bound to appear without his consent, and as he never appeared, it can not be presumed that he consented. (Smith v. Davis, ante, p. 298.)

It is stated in the brief of the counsel for the purchasers that the main ground on which the court acted in setting aside the sale was, that the infants could not unite as plaintiffs in a proceeding for partition, and his argument is chiefly directed to that view of the subject. If that was the only objection, the judgment and sale under it would be valid. The provisions of the partition law of 1845 that affect this question have been in force for more than thirty years, and it is believed that the practice has generally prevailed, according to circumstances, in several of the circuits, not only to join infants by their guardians as petitioners, but to unite as petitioners all the parties in interest. Many of the oldest and most experienced members of the bar have pursued this course, and have given a practical and contemporaneous construction to the statute, so that the practice has worked itself into the records and judgments of the courts, which have become the muniments of title on which repose the security of the homes and fortunes of a large portion of the community. We recognize the propriety of maintaining the stability of the decisions of this court, especially where rights

Thornton v. Thornton.

have been acquired on the faith of them; and though we do not concur in the reasoning or conclusion of the opinion in the case of Johnson and Noble, 24 Mo. 252, we would not be inclined to disturb it if we did not believe that it has shaken confidence in the titles to a vast amount of property acquired in good faith, and under proceedings conducted in the usual way.

The first section of the partition act of 1845 provides that when any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common, or coparcenary, it shall be lawful for any one or more of the parties interested therein to present a petition to the circuit court of the proper county, and, though the fifth section directs that a copy of the petition and notice shall be served on all parties interested who shall not have joined in the petition, and on the guardian of such as are minors or of unsound mind, it does not say that infants by their guardians may not be joined. Indeed it would require language not susceptible of a doubtful construction to warrant such a conclusion, since by the general law infants in all other civil cases can sue as plaintiffs by their guardian or next friend. The scope of the act shows it was intended that infants should be represented by their guardians either as plaintiffs or as defendants; hence the 54th section provides that it shall be lawful for the circuit court, for any of the purposes of the act, before or after any proceedings by virtue thereof, to appoint a guardian for any minor, and such guardian, for all the purposes of the act, shall have the same power as any general guardian. It seems that proceedings may be commenced against an infant before the appointment of a guardian; hence the power to appoint after proceedings; but if an infant can only occupy the position of defendant, the power to appoint a guardian before proceedings is entirely useless, and full effect can only be given to the statute by the construction that the power to appoint beforehand is to enable an infant to join in the petition. The statute suggests the natural order of events; if the infant is to be a plaintiff, he must appear by guardian;

Thornton v. Thornton.

and if he has none, one must be appointed before he begins the suit; but if he is a defendant, a guardian may be appointed after the proceeding is begun.

The policy is very obvious that requires the guardian to have notice that proceedings are on foot which affect the land of his ward; but how is it material whether he occupies the position on the record as plaintiff or as defendant? A guardian appointed under the authority of the 54th section has the same power as a general guardian, and the 53d section declares that guardians of minors appointed according to law are authorized in behalf of their respective wards to do and perform any matter or thing respecting the division of any land as directed by the act, which shall be binding on the ward, and deemed valid to every purpose as if the same had been done by such ward after his disabilities are removed. This comprehensive language, without the aid of any other section, seems sufficient to clothe the guardian with power to initiate proceedings for partition on behalf of his ward.

It is the duty of every minister of the law to watch with jealous care the rights of infants; but human wisdom has not yet succeeded in providing a shield that will protect the weak and innocent against the strong and the crafty, and it is not perceived how infants are more exposed to robbery or treachery when they are plaintiffs, than when they are defendants. If an infant has no other means of support but an undivided interest in real estate, it is often of great importance to him to have the power of forcing a partition and of securing the separate enjoyment of his share; for, whilst it is held in common with an obstinate co-tenant, it would not be productive in yielding a ground rent, or in any other manner; and to deny him the right to have a partition would drive him to wait or to an application to the county court for the sale of his interest, and in that way produce the very result dictated by the cupidity of his tenant in common.

The doctrine of Johnson and Noble can do no good in preventing for the future any of the mischief apprehended in

Lowe v. Sinklear.

the opinion, because the general assembly, in the next month after the opinion was delivered, not impressed with the sense of danger entertained by the court in allowing infants to be plaintiffs in partition, enacted that "when any minor is interested in any real estate in which there are other parties holding undivided interests, it shall be lawful for the guardian or curator of such minor to file a petition for the division and partition of such real estate." (Sess. Acts, 1856-7, p. 83.) We think that this legislation was unnecessary, and that it is not to be inferred from it that the right it expressly gives did not exist before, but the object was to put at rest any doubt on the subject.

The views we have taken of this case renders it unnecessary to notice the objection of Brunk that the appearance for him was without his authority. The judgment will be reversed and the cause remanded. The circuit court will see that the instalment of the purchase money is refunded, and will set aside the sale and judgment, with leave to the plaintiffs to amend the petition.

All the judges concur in the judgment here given, but Judge Scott adheres to the opinion in Johnson v. Noble.

LOWE, Appellant, v. SINKLEAR, Appellant.

1. Where there is a special contract to do certain work and the contractor fails to perform the work according to the terms of the contract, no recovery can be had by him on the contract.
2. If, however, services are rendered by him which are of value to the person with whom he contracts and are accepted by such person, an obligation is thereby created to pay the reasonable value of such services, not exceeding the contract price, taking into consideration and making allowance for any damage resulting from the breach of the contract.
3. If a minor enter into a special contract to do certain work, he may avoid such contract and may recover a reasonable compensation for the work done, the damage resulting from the avoiding of the contract being taken into consideration and allowed.

Lowe v. Sinklear.

Appeal from Ralls Circuit Court.

This was an action before a justice of the peace to recover five dollars and fifty cents for three weeks and four days' board furnished by plaintiff to defendant. The defendant admitted the demand of the plaintiff, but set up an off-set (exceeding, after allowing credits, the demand of plaintiff in the sum of eighty-one dollars and sixty-five cents) for work and labor done and performed by him in clearing for plaintiff eleven acres of new ground at the rate of eight dollars per acre. At the trial on appeal in the circuit court, it appeared in evidence that the plaintiff Lowe employed one Weaver to clear about fourteen acres of land at the price of eight dollars per acre, to be paid after the clearing was completed. Weaver employed Sinklear to assist him in the clearing. Weaver and Sinklear cleared a portion of the land, when Weaver sold out the contract to Sinklear. The evidence tended to show that Lowe agreed that Sinklear should be substituted in the place of Weaver. Sinklear cleared a large portion of the land, which was immediately put in cultivation by Lowe. Whilst engaged in the performance of this contract Sinklear boarded for several weeks at the house of plaintiff Lowe. Sinklear did not complete the clearing according to the contract. Sinklear, at the time of the performance of the work embraced in his set-off, was under the age of twenty-one years. The court, at the instance of the plaintiff, instructed the jury as follows: "1. If the jury find from the evidence that Mr. Weaver agreed with plaintiff to clear for plaintiff all the land in a certain field or enclosure, and that plaintiff agreed with said Weaver to pay him for said clearing at the rate of eight dollars per acre, and that it was agreed between plaintiff and Weaver that plaintiff was not to pay for said clearing until the whole was completed; and if the jury further find that said Weaver transferred his interest in said contract to the defendant, and that defendant did the work mentioned in his set-off under said contract and transfer, then the defendant can not recover for

Lowe v. Sinklear.

said work if he failed to clear all the land in said field." Certain instructions asked by defendant, with respect to the effect of the infancy of defendant, were refused.

The jury found for the plaintiff.

J. B. Henderson, for appellant.

I. The defendant was entitled to recover what his services were reasonably worth. (*Downing v. Burke*, 23 Mo. 228; *Lee v. Ashbrook*, 14 Mo. 378; *Britton v. Turner*, 6 N. H. 481.) The defendant, being an infant, was not bound by the terms of the special agreement. (2 Pick. 332; 11 Verm. 273; 19 Pick. 572; 17 Maine, 38; 23 Pick. 492.)

Seaford, for respondent.

I. The instruction given was correct. (23 Mo. 265, 228.) The instructions asked by defendant were properly refused. The plaintiff made no contract with Sinklear. This contract was with Weaver. If Weaver could not recover, Sinklear could not. Sinklear did not repudiate the contract. He demands pay for eleven acres cleared by him at the contract price. His infancy can avail him nothing in this case. If the plaintiff is responsible to any one, it is to Weaver.

RICHARDSON, Judge, delivered the opinion of the court.

Assuming that the defendant was substituted in Weaver's place in the contract for clearing land, the case must be considered in two aspects: first, as to the defendant's right to recover on his set-off for any portion of the work that was completed before the substitution; and secondly, for the work subsequently performed. As to the work done before the assignment of the contract, the defendant seeks to recover as the representative of Weaver, and for that much he can not of course recover, unless he makes a case that would authorize Weaver to maintain an action if he were suing. If Weaver failed to perform the work according to the stipulations of his agreement, he could not recover in an action on the special contract; but if services were rendered

Ellis v. Kreutzinger.

by him which were of value to the plaintiff and were accepted by him, he would be liable to pay the actual value of the work performed, not exceeding the contract price, after deducting for any damage which had resulted from a breach of the contract. (Lee v. Ashbrook, 14 Mo. 378; Downey v. Burke, 23 Mo. 228.) It has however been said that this doctrine does not apply to the case of a servant hiring himself for a certain period, as for an entire year, at a fixed sum for the year.

From the time of the agreement between the parties that introduced the defendant, the contract became one between the plaintiff and defendant, and, being executed for personal services and not for necessities, the defendant, if he was a minor, had the right to avoid the special agreement and to recover a reasonable compensation for the work which he did after allowing for any injury the plaintiff sustained by the avoiding of the contract. (Chitty on Cont. 579, note; Medbury v. Watraus, 7 Hill, 110; Moses v. Stevens, 2 Pick. 332.) The case of McCoy v. Huffman, 8 Cow. 84—on the authority of which the case of Weeks v. Leighton, 5 N. H. 343, and Owen v. Black, 4 Black. 338, were decided—is expressly overruled in 7 Hill, 110.

The instruction which the court gave was erroneous, and the judgment will be reversed and the cause remanded; the other judges concurring.

ELLIS *et al.*, Appellants, v. KREUTZINGER, *et al.*, Respondents.

1. The deposit of a policy of insurance with a creditor of the assured as a security for the debt gives such creditor a lien upon the proceeds of the policy, a lien binding upon the assured, the insurer and upon all who, with notice of such lien, take an interest in the policy from the assured.
2. The clause in a policy which prohibits an assignment of the policy without the consent in writing of the insurance company, does not apply to a deposit of the policy by way of pledge.

Ellis v. Kreutzinger.

Appeal from St. Louis Court of Common Pleas.

One Kreutzinger was indebted to the firm of Ellis & Caverder, as a security for which said firm held a mortgage on his stock of goods. Kreutzinger also delivered to said firm, as a security for said indebtedness, a policy of insurance on said stock of goods, executed in his favor by the St. Louis Mutual Fire and Marine Insurance Company of St. Louis. Said Kreutzinger was also indebted to the firm of Douglass, Gazzam & Co. and to that of Fallenstein & Gauss. The goods were lost by fire. After the loss, an assignment of the policy was made upon the books of the company to one Meyer in trust for the two firms last named. This assignment, it is contended by plaintiffs, was made with notice, on the part of the company, the trustee, and the *cestuis que trust*, of the rights of plaintiffs and in fraud of those rights. The company paid the loss to Meyer, who appropriated the sum received in payment of the debts due the firms of Douglass, Gazzam & Co. and of Fallenstein & Gauss. The plaintiffs pray for judgment against Kreutzinger for the debt due them, and that the other defendants be required to refund and pay over to plaintiffs the sums received by them on the policy.

The plaintiffs asked and the court refused the following declaration of law: "If the court is satisfied from the evidence that the defendant Kreutzinger deposited the policy in question with the plaintiffs in pledge for the further security of an existing indebtedness from him to them; that at the time of such deposit an indebtedness existed and still subsists unpaid from said Kreutzinger to the plaintiffs to the amount claimed by them, and that said defendant Meyer, as trustee of said firms of Douglass, Gazzam & Co. and Fallenstein & Gauss, at the time of the payment of the proceeds of said policy to him as such trustee, had notice of such pledge, then the plaintiffs are entitled to recover of said firms the amount of such indebtedness, not exceeding the amounts received by them, to be contributed and refunded by said

Ellis v. Kreutzinger.

firms in the proportion of the amounts received by them respectively out of the proceeds of said policy; and, further, if said Meyer, at the time of the payment of said proceeds to him as aforesaid, had knowledge that the said policy was in some way charged or affected in the hands of the plaintiffs, that is constructive notice of all the facts and instruments to a knowledge of which he might have been led by an inquiry after such charge or circumstances affecting the policy."

The court gave the following instruction at the instance of defendants: "If the assignment of the policy of insurance read in evidence was made to Meyer to secure debts due by Kreutzinger to Douglass, Gazzam & Co. and Fallenstein & Gauss, and no notice given to the insurance company or said Meyer of any other assignment of said policy to any other person or persons, and that said Meyer, before the bringing of this suit, paid over the proceeds to the creditors of said Kreutzinger, then the plaintiffs can not recover."

The court found for the defendants.

N. Holmes, for appellants.

I. The deposit of a policy of insurance in pledge for the security of a debt gives a lien in equity on the proceeds of the policy as against the assured making the deposit and all persons claiming the fund under him with notice. (1 Phill. Ins. 68; 2 Duer on Ins. 61, 57, § 35; 10 S. & R. 412; 2 McMul. 237; 2 Story on Eq. § 1047, 1258, 1250.)

The clause in the policy which provides that it shall not be assigned without the consent in writing of the insurance company has reference only to an actual assignment of the instrument on a change of property in the subject insured previous to a loss, and is intended merely for the protection of the company against an alienation of the subject insured. It has no application here. (2 Duer on Ins. § 40; Arnold on Ins. 1249; 1 Phill. on Ins. 34, 58.)

III. There was no assignment of the policy before a loss to Meyer. The assignment to Meyer was an assignment of the

Ellis v. Kreutzinger.

proceeds of the policy, all the parties having notice of the prior equity of the plaintiffs. (2 Duer, 65; Arnold on Ins. 1249; 1 Phill. on Ins. 39; 8 Hall, 372.) The doctrine of constructive notice applicable was correctly enumerated in the plaintiffs' instruction. (Jones v. Smith, 1 Hare, 43; 1 Sto. Eq. § 399, 400, 408; 3 Sugd. on Vendors, 471.) The instruction given for defendants was erroneous.

Burnes and S. T. & A. D. Glover, for respondents.

NAPTON, Judge, delivered the opinion of the court.

The authorities are very clear that the deposit of a policy of insurance with a creditor of the assured, as a security, collateral or original, for the debt, gives the creditor a lien on the proceeds of the policy, which is binding upon the underwriters and upon the assured, and upon all those who take an interest from the assured with notice of such lien. (1 Phill. Ins. § 98; 2 Duer, § 36; 10 Serg. & R. 412.)

The clause in this policy, which prohibits an assignment of the policy without the consent in writing of the company, does not apply to a deposit of the policy by way of pledge. The interest of the underwriters can not be affected by any transfer which does not also transfer the title to and a control over the property assured, and therefore such restrictions have not been understood to apply to assignments in which the underwriters can have no interest, and to control which they can have no motive. (2 Duer, § 40.)

The insurance company, in this case, paid up the policy, without calling for its production, to the defendants who claimed to be assignees. It is not necessary to say that the possession of the policy by the plaintiff and the failure of the defendants to produce it, were of themselves notice to the company that it belonged to the plaintiffs, or to some one else; but it would seem to be clear that these circumstances were sufficient to put the company and the defendants upon inquiry. The evidence was that both the company and the defendants were apprised that the policy was in the hands of

Grand Lodge of Masons v. Knox.

the plaintiffs and that they claimed an interest in it. The instruction asked by the plaintiffs should have been given. (10 Serg. & R. 412.)

The judgment is reversed and the cause remanded. Judge Scott concurs. Judge Richardson not sitting, having been of counsel.

GRAND LODGE OF MASONS, Defendant in Error, v. KNOX,
Plaintiff in Error.

1. It is a mixed question of law and fact whether particular things are fixtures or not; juries should be guided to an intelligent determination of the question by an explanation of the legal meaning of the term.

Error to Marion Circuit Court.

This case has heretofore been before the supreme court. (See 20 Mo. 433.) The following is the first instruction given at the instance of the plaintiff: "1. Unless the jury find from the evidence that the five presses, or some of them, were fixtures embraced in the sale of the land, and that they were removed by the plaintiff after the bargain was made and before the formal transfer of the property, without the knowledge and against the will of Knox, they will find for the plaintiff the two hundred and fifty dollars claimed with interest."

Knox & Kellogg, for plaintiff in error.

Broadhead, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

This judgment must be reversed because the first instruction left to the jury to find whether the book-cases were fixtures or not, without giving them any explanation of this term by which they could have been guided to an intelligent determination of the question.

The instructions concerning the bargain and the date of its completion are probably correct in the abstract, but they really appear to have but little to do with the merits of this claim. As the defendant, however, asked counter-instructions upon this point and thereby appeared to have acquiesced in its relevancy and importance, we should not on this ground alone feel authorized to reverse the judgment. Whether the bargain was closed on the 21st of September, 1849, appears to be not material in this controversy, since the letter of that date, however conditional it may have been, actually resulted in a bargain and sale upon the terms specified in the letter; and if the book-cases were fixtures, and were removed without the consent, express or implied, of the defendant, after his examination of the premises, such removal would hardly consist with good faith, although it may have taken place prior to final consummation of the bargain.

There was evidence in this case tending to show that the defendant, on his way to examine the premises which he proposed to buy, was apprised by the agent of the Grand Lodge that they had removed or were about to remove these book-cases to Lexington. If the defendant attached any importance to the book-cases in his contemplated purchase and was unwilling that they should be removed, it would seem natural that he would have made known his objections at that time. It is uncertain from the testimony whether the defendant ever looked into the chapel building at all during the examination of the premises which resulted in his proposition of the 21st of September. If he did and saw the book-cases still there and considered them of importance in his trade, would he not have come to a distinct understanding about this matter, after the communication made to him by Mr. Draper? If he did not see the book-cases, might not his previous silence, when informed of their removal, be construed as an acquiescence? These questions were of course for the jury; and, although it is true that they were submitted to the jury which tried this case and decided against the

Hannibal & St. Joseph Railroad Co. v. Morton.

defendant, yet they were so connected with other matters, some of which the jury had no right to decide at all, and others having but little if any bearing on the merits, that we are not at liberty to take this verdict as conclusive upon the point.

If the removal of the book-cases was attended with unnecessary injury to the building, that would be a distinct ground of damages independent of the defendant's assent.

The judgment is reversed and the cause remanded ; Judge Richardson assents. Judge Scott absent.



HANNIBAL AND ST. JOSEPH RAILROAD COMPANY V. MORTON.

SAME V. SAME.

1. Where, in proceedings instituted in behalf of the Hannibal and St. Joseph Railroad Company, under its charter, to obtain the condemnation and appropriation of land upon which said railroad had been located, it was stated, in the report of the viewers appointed to assess the damages, that before proceeding to examine the damages they took the oath prescribed by the statute, but the oath itself was not set forth ; *held*, it not appearing that any objection was made to the report on this ground, that the recital in the report was sufficient to show that the required oath had been taken.
2. The supreme court would not in such case quash the proceedings for the reason that the record thereof does not show affirmatively that the viewers were citizens of the county.
3. The charter of the company not making any provision for bills of exceptions in such cases, they could not be taken ; if taken, they would form no part of the record.
4. The supreme court could not, in such case, quash the proceedings on the ground that the damages allowed by the commissioners were inadequate.
5. *Quere*, when may writs of *certiorari* issue from the supreme court, and what is the proper office and function of such writs ?

Certiorari to Judge of Marion Circuit Court.

Since the dismissal of the writs of error in these two cases, (see 20 Mo. 70,) the defendants, David and Samuel Morton, petitioned the supreme court to grant writs of *certiorari* directed to the judge of the Marion circuit court. In obe-

Hannibal & St. Joseph Railroad Co. v. Morton.

dience to these writs, transcripts of the records in said cases were filed in the office of the clerk of the supreme court, on which said defendants made assignments of error.

The facts, it is deemed, sufficiently appear in the opinion of the court and in the report of the case of Hannibal & St. Joseph Railroad Co. v. Morton, 20 Mo. 70.

S. T. & A. D. Glover, for S. & D. Morton.

I. The writ of *certiorari* is the proper process to bring up an unfinished proceeding in an inferior court of record, or a summary proceeding in such court not according to the course of the common law after judgment, where there is alleged error. (Redfield on Railways, 469; 3 Humph. 145; see 2 Ala. 35; R. M. Charl. 298; 9 Ohio, 143; 8 Greenl. 293; 5 Binn. 24; 3 Halst. 122; 1 Gill & Jo. 196; 10 Wend. 174; 5 Mass. 423.) The common law writ of *certiorari* may issue to all inferior tribunals in cases where they exceed their jurisdiction or proceed illegally, and there is no appeal, or other mode of directly reviewing their proceedings. (14 Ills. 383; 13 Ills. 660.) No appeal or writ of error lies here. (20 Mo. 70.)

II. The proceedings against the Mortons were contrary to the charter of the company, illegal, and ought to be quashed. The proceedings were not commenced until the road was constructed. (See 10 How. 395; Sess. Acts, 1837, p. 250, § 10; Red. on Railw. 114-5; 10 Wend. 167.) The statement of the clerk that the viewers took the required oath is not what the law required. The oath was to be subscribed and kept to be seen. The record should show that the law has been complied with. It does not. There was only nine days' notice of the first assessment of damages. This assessment was therefore a nullity. It was given not by the viewers, but by Joshua Gentry, agent of the company. There was no notice at all touching the last assessment. The order of the clerk entering judgment on the second report was illegal and void. The objections were entered in time, three days after the filing of the report. (See Sess. Acts,

Hannibal & St. Joseph Railroad Co. v. Morton.

1837, p. 250.) The judgment was in the face of the statute. When objections were filed, the judge was to consider them and then direct the proper judgment to be entered.

Lamb & Lakenan, for Hannibal and St. Joseph R. R. Co.

I. The decision of the circuit judge upon the report of the commissioners was final and conclusive. (20 Mo. 70.)

II. The writ of *certiorari* should have been directed to the judge who rendered the decision. The return should have been made by him personally. The return to the writ is made by the clerk of the circuit court for Marion county.

III. Writs of *certiorari* can not be substituted for writs of error. (4 Mo. 251.) They will not lie where substantial justice has been done between the parties. (20 Pick. 71; 24 Pick. 181.) The supreme court can exercise appellate jurisdiction only. *Certiorari* does not lie after judgment. (1 Tidd's Practice, 330.) Nor will it lie from a superior to an inferior court except where the former has original jurisdiction. The proceedings in the present cases were regular. The only objection made by Morton at the time that is now urged is, that the damages were assessed after the road had been constructed by the company. The record does not show whether damages were assessed before or after the work had been finished or commenced. The record shows that the requirements of the statutes were substantially complied with.

NAPTON, Judge, delivered the opinion of the court.

These two cases were before this court on writs of error, (20 Mo. 70,) and it was held that the writs of error would not lie in such cases, and the writs were therefore dismissed. The records are now before the court on *certiorari*.

We have no statute here regulating writs of *certiorari*, nor has this court, so far as we are aware, given any construction to the constitutional provision which authorizes this court to issue the writ. It is not deemed necessary to undertake in this case to determine the exact class or classes of

Hannibal & St. Joseph Railroad Co. v. Morton.

cases in which this writ may be resorted to. A reference to the English commentators and judicial decisions will readily show that the writ is much more extensively used in that country than it could be here, and under such circumstances which would totally exclude any resort to such a proceeding in this state. Admitting that a *certiorari* is the proper process to bring up a summary proceeding had before an inferior court, not according to the course of the common law and therefore not examinable on error, yet the power of the court which issues the writ is restricted to an examination of such irregularities as occur in the exercise of the jurisdiction of the inferior court and are apparent on the face of the record sent up. Where the inferior court has no jurisdiction at all, the opinion seems to prevail in England that a *certiorari* is not the appropriate remedy, but the party aggrieved must resort to his action of trespass. In this country, it seems to be the opinion of some of the courts that such cases are the very ones in which *certiorari* may be resorted to, and that a principal and leading object of the writ is to restrain the action of inferior magistrates within their proper sphere. (*Birdsall v. Phillips*, 17 Wend. 466; *Redfield on Railways*, § 202 and cases cited.) Without undertaking to decide which of these views is correct, we will proceed to examine the errors assigned in the proceedings now before us. Most of these objections, it will be perceived, are very technical, and do not touch the merits of the proceeding.

The first is, that the record does not show that the oath prescribed by the statute was taken by the viewers. The report of the viewers to the court states that the viewers, before proceeding to examine the land and assess the damages, took the oath prescribed by the statute, but the form of the oath is not copied in the report. As no objection was made by the owners of the land to the report on this ground, we must presume that the oath was in proper form and duly administered; for so the record states, and there is nothing to contradict it. If we require that every minute particular, which

the statutes point out as requisite in such proceedings, shall appear on the face of the record, so that this court may on *certiorari* be enabled to see an exact conformity to every requisition of the law in all the steps of the proceeding, however formal, not many proceedings of this character would be likely to stand. It is no more than a reasonable intendment, in this case, that the oath was substantially the one required, and we take the recital that it was so in the report of the viewers to be sufficient to show this.

It is next objected that it does not appear that the viewers appointed to condemn this land were citizens of the county of Marion. The statute requires the court to appoint citizens of the county, and the record is silent on this subject. We think there is nothing in this objection. Our statute concerning jurors requires them to be "free white citizens of the state, resident in the county, sober and judicious, of good reputation," &c. Would this court reverse a judgment because the record of a trial did not show affirmatively that the jury which tried the case was composed of this class of citizens?

The third objection is, that the notice given in the first instance was only nine days, when the law required it to be ten. This is true of the first notice; but the first assessment was set aside and another set of viewers appointed; and in relation to the second assessment no objection on the ground of notice is made or could have been made, as it seems upon the record to have been legal. The objection to the first notice may be considered as waived, and whether waived or not, it can not affect the propriety or legality of the ultimate assessment which the judge mentioned.

The next objection is, that the proceeding was instituted in the name of Joshua Gentry, who described himself as agent of the company, and not in the name of the Hannibal and St. Joseph Railroad Company. This objection, in point of fact, only applies to one of the cases; for, on examining the record in the case of David Morton, the proceeding appears

Hannibal & St. Joseph Railroad Co. v. Morton.

throughout in the name of the Hannibal and St. Joseph Railroad Company. It is substantially so in both cases.

But the principal objection to these proceedings, and the one chiefly relied on, is, that the road had in fact been constructed over the plaintiff's land before the proceedings were instituted, and the proceeding authorized by the statute must precede the occupation of the land. If we confine the office of a *certiorari*, as it is in England, to such cases as are within the jurisdiction of the inferior tribunal whose proceedings are to be reviewed, this objection, if true in fact, would only show that the writ should be dismissed and the party remitted to his action of trespass. But if we adopt what seems to be the practice of the American courts and allow the writ in such cases, the answer to the objection is, that the fact nowhere appears on the record. The writs of error formerly made out in these cases were dismissed, as it appears from the opinion of the court (20 Mo. 74), because the proceedings were before the judge and not proceedings in court. This being so, it is clear that a bill of exceptions could not be taken, for our statutes nowhere make provision for bills of exception in such cases. But the bill of exceptions in this case does not materially differ from the record proper, and there is nothing to show in either that in point of fact the railroad had been constructed before the proceeding was commenced. It is true that on the last motion to set aside the second report this is alleged to have been the fact, and it is so stated as one of the reasons for a new trial; but *non constat* that the court may not have overruled the motion for the very reason that the fact was not as alleged. The petition on which one of these proceedings is based was in these words: "J. G., agent for said company, comes and gives notice to the judge of this court that said company *wish to run their road through* the N.W. $\frac{1}{4}$ of section 35, &c., of which said defendant is the owner," &c., and prays "the appointment of viewers to examine and view said land and assess the damages thereof, and thereupon," &c. In the case

Hannibal & St. Joseph Railroad Co. v. Morton.

of Samuel Morton, the petition is, "that the company *wish to run the road through* the land of said defendant and to occupy a strip," &c., &c. ; and, as the parties could not agree on the damages, the prayer is, that viewers be appointed "to examine and view said land and assess the damages *done thereto* by reason of the location and construction of said road ;" and so the proceedings go on, indiscriminately using words in the past and future tense, from some of which language it might be inferred that the road was already built, and from other portions in the same proceeding that it was yet to be constructed. Whether the road had been constructed before the proceedings in these cases commenced, or had not, was a fact, which, if it had been thought of any importance, would easily have been proved, and could readily have been made to appear on the record. But it is plain that the fact, however it was in reality, was deemed of no importance, for the only alleged ground for setting aside the first assessment was the insufficiency of the compensation allowed ; and it was not until the second review was ordered and made, and a motion was made (as appears in the bills of exceptions) for a third appointment of viewers, that this subject was even alluded to, and then there is nothing to show how the fact was.

It is quite manifest from the whole record in these cases that the substantial and real grounds of objections were in both cases the supposed inadequacy of the damages allowed by the commissioners appointed by the court. Whether this was so or not, or upon what grounds the viewers acted, we have no means of knowing, and, if we had, could furnish no redress. Two sets of viewers, intelligent and impartial citizens, no doubt, of the county, and fully acquainted with all the facts which deserved consideration in forming a judgment, have passed upon the question of damages, and there is no power in this court to correct any erroneous opinion they may have entertained or acted on, if such error has in truth existed.

There is therefore no ground appearing upon the record

returned under the writ to warrant this court in quashing the proceedings; consequently the writ of *certiorari* must be dismissed. Judgment accordingly; Richardson, Judge, not sitting, having been of counsel.

THE STATE, Respondent, v. BALL, Appellant.

1. In the case of a conviction for an offence not capital, an omission to enter of record the *allocation*, or formal address of the judge to the prisoner asking him if he has any thing to say why sentence should not be pronounced against him, is not of itself fatal.
2. In the entry of the empannelling of a jury, the jury were stated to be "twelve good and lawful men," and their names were given, but the same name was inserted twice, making thirteen in all; *held*, that this was merely a clerical error.
3. An affirmative verdict, in response to an indictment for murder in the first degree, of "guilty of murder in the second degree, in manner and form as charged," &c., is by implication an acquittal of murder in the first degree, and, so long as it stands, it is a bar to any prosecution for the higher grade of offence.

Appeal from St. Charles Circuit Court.

The instructions numbered one and five, mentioned in the opinion of the court, are as follows: "1. If the jury believe from the testimony that Ball formed a determination in his own mind to kill Mark; that this determination was deliberately formed before the act of killing took place; and that after such determination was so formed, he did in pursuance thereof commit the act of killing in the manner charged in the indictment, then the prisoner is guilty of murder." "5. If the jury believe from the evidence that the defendant had reasonable cause to apprehend a design on the part of the deceased to kill or rob him, or to do him some great personal injury, and had reasonable cause to believe he was in immediate danger of such design being accomplished, and he shot and killed deceased under these circumstances, you should acquit him on the ground of justifiable homicide;

State v. Ball.

and in such case it makes no difference whether defendant was at that time in any real or actual danger or not."

U. Wright, for appellant.

I. Illegal evidence was permitted to go to the jury against the defendant. The case made by the proof is not the case charged. The first instruction is not law. Every fact hypothetically stated in this instruction may be true and yet no crime be committed, much less murder. The error is not cured by a separate and independent instruction touching justifiable homicide. (See *State v. Phillips & Ross*, 24 Mo. 491.) Self-defence includes both a design to kill and the deliberation necessary to make that design effectual. The verdict was not responsive to the charge in the indictment of murder in the first degree. (See *Plummer's case*, 6 Mo. 232; *Watson's case*, 5 Mo. 497; *State v. O'Brien*, 24 Mo. 402; *State v. Phillips & Ross*, 24 Mo. 475; 9 Yerg. 333; 6 Humph. 410.) The jury was an illegal body, being thirteen in number. (3 S. & R. 237; 8 Blackf. 561; 2 Penning. 663.) The record is conclusive of the fact. It does not conclusively appear that the defendant was present when the judgment was rendered; nor does it appear that the defendant was asked before judgment whether he had any thing to say why judgment should not be executed. (2 Salk. 630; 3 Salk. 358; 4 Black. Comm. Appendix; 6 Barr, 384; 4 Harris, 129.)

Mauro, (circuit attorney,) for the State.

NAPTON, Judge, delivered the opinion of the court.

In capital cases the record should show that the prisoner was present when the verdict is rendered, and that he was asked, before judgment pronounced, if he has any thing to say why sentence of death should not be passed. In England, this is considered necessary even in clergyable felonies; but no decisions have been found in that country where the omission of the *allocution* alone is held fatal except in cases of high treason. (1 Chitty C. L. 700; 2 Salk. 630; 3 Salk.

State v. Ball.

358.) We observe no case in this country where the judgment has been reversed for this clause alone, even where the case was a capital one, though in *Hamilton v. The Commonwealth*, 4 Harris, 133, this is one of the grounds of reversal. In that case it also appeared that the prisoner was not present when the verdict was rendered; or rather the record failed to show that he was present. Whether, under our practice, it would be necessary to reverse a judgment in a capital case because of the omission on the record of what is termed the *allocution*, or the formal address of the judge to the prisoner asking him why sentence should not be pronounced, when the record shows that he was present during the whole trial and at the rendition of the verdict and judgment and that he filed his motion for a new trial and in arrest of judgment, it is not necessary in this case to determine. The reason given for the importance attached to this form in England is, that the revising court may see that the prisoner had an opportunity of moving in arrest, or of pleading a pardon. It would not be material here whether a pardon was produced before or after judgment, as no attainder or other such consequences result from a capital conviction here, which a pardon even after judgment may not remove. It is sufficient that the case under consideration is not a capital one, and the omission complained of is therefore unimportant.

The objection that the defendant is not shown to be present when the verdict and judgment were rendered, is not in our opinion sustained by the record. The entry is, "Now at this day appears the said plaintiff (the State) by attorney, and the said *defendant was brought into court* and appeared by his attorneys," &c. It seems the defendant and his attorneys were both present.

Nor, in our judgment, is the objection that there were thirteen jurors borne out by the record. The record states that the jury was composed of twelve good and lawful men, and gives their names, but the name of one of the jurors is

State v. Ball.

put down twice. This is a clerical error, which appears on the record to be such merely, and can do no harm.

The verdict in this case is, "that the defendant is guilty of murder in the second degree in manner and form as charged in the said indictment, and said jurors assess the punishment of said defendant to imprisonment in the penitentiary for ten years." In Plummer's case, 6 Mo. 232, the jury expressly found the defendant not guilty of murder in the first degree, and then found him guilty of some other grade of homicide embraced in this indictment. The verdict in this case, by necessary implication, finds the same thing. A conviction of murder in the second degree necessarily acquits of murder in the first degree, and the verdict in the latter case, so long as it stands, unquestionably bars any prosecution for the first named offence. Whether such a verdict would prevent an inquiry into the crime of murder in the first degree, if it was set aside and a new trial awarded, is a question not important to be determined in this case.

It is contended that instructions No. 1 given for the State and 5 given for the prisoner, are inconsistent and calculated to mislead, and that at all events instruction No. 1, considered as an independent instruction, is wrong. If we could see any ground for this construction placed upon the instructions, it would beyond doubt be the duty of this court to reverse the judgment. But we do not so understand them. It will be observed that instruction No. 1 is upon the subject of murder in the first degree, and contains an explanation to the jury of the facts and circumstances necessary to be found by them in order to convict the defendant of this crime. Instruction No. 5 is upon the subject of justifiable homicide, and is explanatory of the facts and circumstances appropriate to this defence. Each instruction is conceded to be abstractly correct, provided it be understood that the one is only applicable in the event that the other is not. This implication is, we think, a necessary one, and without which the instructions would lead to the grossest absurdity. If both instructions had been on the same topic, this implication

State v. Ball.

might not be so apparent, and therefore in many cases heretofore, as in Phillips' case referred to, this court has found it necessary to reverse for giving such instructions. This has been done because the instructions might mislead. But how could the jury have been misled in this case? It could only be by supposing they were willing to act upon instructions, which, interpreted as they are now said to be susceptible of being, would involve plain and palpable contradictions. But it is not easy to see how a jury of sensible men could be misled by the instructions in this case. Their attention is first directed to murder in the first degree and its constituents, and they are directed, if they find the facts as therein specified, to find the defendant guilty. They are afterwards instructed upon another view of the case suggested by the defendant's evidence and tending to show a case of justifiable homicide, and that branch of the law is explained to them and the facts necessary to constitute the justification are pointed out. Is it possible that the jury could have been so far misled, by the omission of the court to advise them that those two hypothetical views of the case were totally independent of each other, as to suppose that they must convict the defendant of murder in the first degree, notwithstanding they might find the facts to be as hypothetically put in the instruction explanatory of justifiable homicide? Instructions No. 1 and 6 for the State are upon the subject of murder, and leave out of view the subject of justifiable homicide, which is afterwards fully explained in an independent instruction. Is it reasonable to suppose that the jury would take the law in the first instructions and apply it to the facts or hypothesis referred to in the second, or that they would apply the law laid down in the second to the hypothetical facts of the first? They could not do so without arriving at manifest contradictions; but understanding the instructions as we must suppose they did, no obscurity or confusion resulted. If instruction No. 5 had been intended as a modification of instruction No. 1 upon the subject of murder in the first degree, a different inter-

Hall v. County Court of Audrain County.

pretation of the two instructions might have been possible; and in such a state of even possible uncertainty and misunderstanding it might be proper for this court to order a new trial.

The points made here in relation to the admission of certain evidence are not preserved. No exception was taken to the admission of any evidence on the trial.

The judges concurring, the judgment is affirmed.

HALL, Defendant in Error, v. COUNTY COURT OF AUDRAIN COUNTY, Plaintiff in error.

1. An appeal will lie to a circuit court from an order of a county court removing the guardian of an insane person.
2. In perfecting such an appeal, an affidavit and appeal bond or recognizance are not required.
3. A mandamus will lie in such case from the circuit court to the county court requiring it to grant an appeal, although a writ of error might have been resorted to.

Error to Audrain Circuit Court.

B. B. Hall in 1854 was appointed guardian of one Adams, an insane person. In 1856 the county court, without notice to him, removed said Hall from his office of guardian, and appointed one Brown guardian in his place. From this order displacing him Hall prayed an appeal to the circuit court. The court granted the appeal. It afterwards rescinded the order granting the appeal. An affidavit was made by Hall and an appeal bond. The bond was executed to and in favor of Audrain county, and Hall's name was signed by his attorney. Hall applied to the circuit court for a mandamus directing the county court to grant an appeal. The circuit court granted the mandamus. It is to obtain a review of this action that the case is brought to this court by writ of error.

Hall v. County Court of Audrain County.

Carr, for plaintiff in error.

I. The county court had exclusive original jurisdiction of the appointment and displacement of guardians of insane persons. Its action is final. There is no appeal provided for. No affidavit and bond are provided for. (See 3 Ham. 277; 14 Mass. 277; 7 Pick. 321; 17 Johns. 280; 2 Sneed, 50; 1 Kern. 276; 3 Black. Comm. 400; 10 Mo. 594; Deane v. Todd, 22 Mo. 90; 24 Mo. 298; 19 Mo. 223.) It does not follow, because an appeal does not lie, that the action of the county court can not be reviewed by the circuit court. A writ of error would lie. (See 7 Mo. 470.) But if he was entitled to his appeal, he failed to perfect his right by filing an appeal bond. The instrument filed by him was no bond. Granting that an appeal would lie and that he perfected his right, still the county court having granted the appeal, it had no power to set aside its order so granting it, and said order remained in full effect. (See 20 Mo. 458; 11 How. Prac. R. 89; 24 Barb. 166.)

Howell, for defendant in error.

I. The order of the circuit court requiring the county court to grant an appeal was not a final judgment. The writ of error should be dismissed. The order of the county court for the removal of Hall and the order setting aside the appeal were irregular. An appeal lay to the circuit court. The application for the appeal was duly made and the bond sufficient. Besides, the statute does not require an affidavit and bond in this case.

RICHARDSON, Judge, delivered the opinion of the court.

The main question in this case is, whether an appeal will lie to the circuit court from an order of the county court removing the guardian of an insane person. The eighth section of the 47th chapter of the revised statutes of 1855, p. 530, prescribes the power and jurisdiction of the circuit courts, and in the 4th clause of the section this general lan-

guage is employed: "Appellate jurisdiction from the judgments and orders of county courts and justices of the peace, in all cases not expressly prohibited by law, and shall possess a superintending control over them." We have not been referred to any provision of the statute that prohibits an appeal in a case like this; but, on the contrary, the 15th section, which defines the exclusive original jurisdiction of the county court, enumerates, among many other subjects, the power of "appointing and displacing the guardians of orphans, minors and persons of unsound mind," and closes with the sweeping declaration of the right "to appeal in all cases to the circuit court, in such manner as may be provided by law." It will be observed that the language is "in such manner as may be provided by law," and though the general right of appeal is given, "the manner" is not provided in this section nor any other place that we have seen, except in relation to probate matters indicated in the eighth article concerning "Administration." As the manner is not provided, it would seem that neither an affidavit nor a recognizance is required, but that it should be allowed without a *supersedeas*, simply on the request of the party aggrieved, as was the practice in chancery cases under the old system.

The questions, what will be the operation of the appeal, and how the case is to be tried in the circuit court, are not presented by this record.

It is suggested that a mandamus will not lie, because the plaintiff had a remedy by writ of error (R. C. 1855, p. 1295), which would have accomplished every thing that an appeal could. It is generally true that a mandamus will not be granted when the party complaining has another specific remedy and can be redressed either by appeal or writ of error; (Williams & Wyan v. Judge of Cooper Court of Common Pleas, 27 Mo. 225;) and, if the plaintiff was now asking for a mandamus to compel the county court to vacate the order removing him, it could be replied that he had a remedy by appeal or writ of error. But there is no other mode of compelling the county court to allow an appeal;

State v. Cross.

and though the plaintiff could have taken the case up by appeal or writ of error, he had the right to his election.

The order setting aside the allowance of an appeal amounted to a refusal to grant it, and the mandamus was properly awarded.

The other judges concurring, the judgment will be affirmed.

THE STATE, Respondent, v. CROSS, Appellant.

1. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence.
2. Drunkenness does not mitigate a crime; nor can it be taken into consideration by a jury in determining whether a person committing a homicide acted thereon wilfully, deliberately and premeditatedly so as to constitute the crime committed murder in the first degree. (RICHARDSON, Judge, dissents from this doctrine, holding that, although a homicide committed wilfully, deliberately and premeditatedly is in no way mitigated or excused by drunkenness, yet, since the quality and grade of the offence depend upon the state of mind of the accused at the time of the commission of the alleged crime, his drunkenness may be taken into consideration by the jury in determining whether the killing was done wilfully, deliberately and premeditatedly.)

Appeal from Franklin Circuit Court.

C. Jones, for appellant, cited *State v. Buckner*, 25 Mo. 167; 1 Mo. 700; 3 Mo. 28; 6 Mo. 444; 8 Mo. 500; 9 Mo. 19; 12 Mo. 492; R. C. 1855, p. 1191; 1 Archb. C. P. 173; 1 Chitty, C. L. 636; *State v. France*, Overton, 424; 1 Wend. 91; 1 Ills. 109; 5 Yerg. 340; 11 Humph. 154; 4 id. 136; *Pyrtle v. The State*, 9 Humph. 663; Whart. on Hom. 369; 15 How. Prac. 557.

Mauro, (circuit attorney,) for the State.

NAPTON, Judge, delivered the opinion of the court.

The judgment in this case must be reversed because the record does not show that the defendant was present in court when the verdict was rendered. The entire record of the

State v. Cross.

proceedings of the court, in relation to this trial, on the day when the verdict was rendered, is as follows, to-wit: "And afterwards, to-wit, on the 6th day of said month, in the year aforesaid, and at the adjourned term aforesaid, the further following appears of record, to-wit: "State v. Nelson Cross. And the jurors aforesaid this day return into court and upon their oaths do say, we, the jury, find the defendant guilty of murder in the first degree, as charged in the indictment." The authorities are very clear and entirely uniform, both the English and American cases, that the prisoner must be present in a capital case when the verdict is rendered and the record must affirmatively show this. (Rex v. Geary, 2 Salk. 130; Dunn v. The Commonwealth, 6 Barr, 384; Hamilton v. Commonwealth, 4 Harris, 133; State v. France, Overton, 435; 1 Wend. 91.) It was so held, substantially, by this court in The State v. Buckner, 25 Mo. 172. We do not infer because the record shows the defendant was present in court on one day that he was therefore present on the following day. In the case of Dunn v. The Commonwealth, 6 Barr, 384, the record showed that the prisoner was arraigned on the 11th of November, 1844, and it is stated on the record that on that day a jury came, who are named, and the record then proceeded: "Men duly summoned, returned and chosen by ballot, empannelled and sworn November 13, 1844, who, upon their oaths do say," &c. The court held that the record did not show that the prisoner was present when the verdict was rendered, although the record did show that on the 11th the prisoner was arraigned and was of course before the court, and leaves no inference that he was even absent from the court-house from that day when the jury was sworn until the 13th, when the verdict came in. This too purported to be the record of several days' proceedings in one entry; here, the records of each day's proceedings are distinct, as they ought to be, but the record of the proceedings of the 6th day does not show that on that day the prisoner or his counsel was ever in court.

The following instruction was asked upon this trial by the

counsel for the prisoner and refused : " That before the jury can find the prisoner guilty of murder in the first degree they must ascertain as a matter of fact that the accused was in such a state of mind as to do the act of killing wilfully, deliberately and premeditatedly and maliciously, and any fact that will shed light upon the condition of his mind at the time of the killing may be looked into by them, and constitutes legitimate proof for their consideration ; and among other facts, any state of drunkenness being proven, it is a legitimate subject of inquiry as to what influence such intoxication might have had upon the mind of the prisoner in the perpetration of the deed, and whether he was not, at the time of the killing, in such a state of mind by reason of intoxication as would be unfavorable to the commission of a crime requiring deliberation and premeditation." The court gave the following instruction on this branch of the case : " The jury are further instructed that if the circumstances attending the killing, the weapon used, the nature and extent of the injury inflicted, and the amount of violence used, with all the other evidence in the case, satisfy them that Cross intended to kill McDonald, then the circumstance of his being drunk at the time is not sufficient to repel the inference of malice and premeditation arising out of such evidence, or to mitigate the offence from murder in the first degree to murder in the second degree, or any other less offence."

The old and well established maxim of the common law is, that drunkenness does not mitigate a crime in any respect; on the contrary, that it rather is an aggravation. Insanity is a full and complete defence to a criminal charge; yet drunkenness is a species of insanity, and is attended with a temporary loss of reason and power of self-control. But drunkenness is voluntary; it is brought about by the act of the party, whilst insanity is an infliction of Providence, for which the party affected is not responsible. This is understood to be the basis of the distinction which the law has made between these two kinds of *dementia*, and is the prin-

cial reason why the rules of law have been settled so as to allow the one madness to constitute an exemption from legal responsibility, but deny to the other any mitigating qualities whatever. There are also obvious reasons of public policy why the law should be so established.

Some efforts have been made, of comparatively recent date—for the maxim we have quoted is as old as the common law itself—to qualify or to get rid of this ancient rule. Some very authoritative books on criminal law and some courts of great respectability, both in England and this country, have suggested interpretations and modifications of the axiom, tending, as we think, to subvert the principle itself for all practical purposes. Russell, in his work on crimes, says: "Though voluntary drunkenness can not excuse from the commission of a crime, yet when, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated *has been holden* to be a circumstance proper to be taken into consideration." The authority for this suggestion of Russell is the case of *Rex v. Grindley*, decided at the Worcester assizes in 1819; but in *Rex v. Carrol*, 7 Carr. & Payne, 145, Parke, B., in the presence of Littledale, J., said "that case was not law."

In this country, the subject is very ably discussed by Judge Turley, of the supreme court of Tennessee, in the case of *Pyrtle v. The Commonwealth*, 9 Humph. 663, and by Judge Wardlaw, of South Carolina, in the case of *Hute v. McCarty*, 1 Spear, 392. The authorities on both sides of the question are pretty generally referred to and reviewed in each of these cases, yet the results to which the two courts arrived were quite the opposite of each other. It is true the supreme court of Tennessee declare their maintenance of the ancient doctrine of the common law in all its original severity, and repudiate quite distinctly the case of *Rex v. Grindley*, and the dictum of Russell based thereon; but by a process of ingenious reasoning the court seem to arrive at a conclusion indirectly overturning the principles and rules they start out

with, maintaining and leading practically to the doctrine advanced by Russell and the decision of Justice Holroyd in *Rex v. Grindley*. It is not perceived how drunkenness can be held to be a circumstance proper to be considered by a jury in determining the question of premeditation and malice, and at the same time be considered as no mitigation of the crime. It is said that there is no inconsistency in the two doctrines, because the fact of drunkenness may show that the crime charged was not committed. If the crime charged was not committed, then it is immaterial whether the defendant was drunk or sober; he is, in either event, entitled to an acquittal. But if all the circumstances in the case, except drunkenness, show that the crime charged was committed, and drunkenness alone is the circumstance to show that by reason of its intervention among the circumstances of the case the crime was different from what it would have been in the absence of this circumstance, then it is manifest that this circumstance alone has produced the mitigation, and the old principle of the common law, which pronounces drunkenness to be no mitigation, is overturned.

In the case of *Pyrtle*, it is conceded in the opinion that, except in relation to the two grades of homicide, distinguished in their code as they are in ours as murder in the first and second degrees, drunkenness would not be a legitimate subject of inquiry; that upon the question of provocation it should have no weight, but on the question of premeditation it should. It is singular that in *Rex v. John Thomas*, 7 Carr. & P. 735, a British Judge—Baron Parke—took quite the opposite position. He is reported to have said to the jury: "I must also tell you that if a man makes himself voluntarily drunk, this is no excuse for any crime he may commit when he is so; he must take the consequences of his own voluntary act, or most crimes would go unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger exci-

ted by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober." The supreme court of South Carolina, in commenting on this charge of Baron Parke, admit its propriety, if it is to be understood as maintaining that he who is in a state of voluntary intoxication is subject to the same rule of conduct and the same legal inferences as the sober man, and that when a provocation is received which, if acted on instantly, would mitigate the offence of a sober man, and the question in the case of the drunken man is, whether that provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question. But the remarks of Baron Parke, thus construed, would clearly be unfavorable to the defence, and would substantially make intoxication an aggravation rather than a mitigation.

The case put by Judge Turley to illustrate his views, and probably as strong a case as could be imagined, is, where the crime charged is murder by poison, and the question is, whether the poison was administered intentionally or by mistake. The facts supposed are, that two medicines are on the table—the one poison and the other not—and the poison is administered. The inquiry made is, whether the fact that the man who administered the poison was drunk is not evidence to show the probability of mistake. The answer is very easy if we adhere to the doctrine that drunkenness does not palliate or mitigate a crime. A mistake or accident may happen to a man, whether drunk or sober, and if they are more likely to occur when in the former predicament, he is not entitled to any advantage over the sober man by reason of this. If he is, the maxim of the common law is worthless, or is so easily evaded as to furnish no practical guide in the administration of justice; there is one rule for the sober man and another for the drunken man.

According to our understanding of the law, the instruction asked by the defendant in this case was properly refused; such instructions, we think, would subvert ancient and well settled principles, and proclaim virtual impunity to the most

enormous crimes. It would only be necessary for a man to dethrone his reason by intoxicating drafts—reduce himself to a state of brutal insensibility to the value of human life, and then take shelter under the plea of drunkenness for protection against the consequences of his acts. If a man can thus divest himself of his responsibilities as a rational creature and then perpetrate deeds of violence with a consciousness that his actions are to be judged by the irrational condition to which he has voluntarily reduced himself, society would not be safe. To look for deliberation and forethought in a man maddened by intoxication is vain, for drunkenness has deprived him of the deliberating faculties to a greater or less extent; and if this deprivation is to relieve him of all responsibility or to diminish it, the great majority of crimes committed will go unpunished. This however is not the doctrine of the common law; and to its maxims, based as they obviously are upon true wisdom and sound policy, we must adhere.

The instruction given by the circuit court was, in our opinion, substantially correct. It might and perhaps ought to be so modified as to include, among the circumstances specifically alluded to, some of those favorable to the prisoner in connection with those already stated of an unfavorable bearing, such as the previous relations of the parties, the previous and subsequent conversations, &c.

The judgment will be reversed and the cause remanded.

RICHARDSON, Judge. Every homicide is not murder, but the quality of the offence depends on the intent of the offender, and therefore the mental *status* at the time of the act must be ascertained before the legal character of the crime is determined. To constitute murder in the first degree, it must be committed wilfully, deliberately and premeditatedly. This condition of the mind is proven when death is inflicted by poison or lying in wait for that purpose; but if neither of these circumstances attend the killing, the ingredients to constitute murder must be proved, and the ability of the

State v. Cross.

accused to form a purpose, to think, or deliberate, must be considered. The question is not whether there ought to be one law for a sober man and another law for a drunken man, nor whether drunkenness will mitigate the criminality of an act; for if a man commits wilful, deliberate and premeditated murder, he is guilty, drunk or sober, and deserves to suffer death; and drunkenness will not excuse or mitigate the offence, if it were done wilfully, deliberately and premeditatedly. But the inquiry is, whether in fact the crime has been committed; and as the essence of the crime of murder is made by law to depend upon the condition of the criminal's mind at the time, all the circumstances ought to be heard in evidence to enable the jury to decide whether such wilful, deliberate and premeditated design existed; and drunkenness is a proper subject to be considered by the jury for whatever it is worth in determining the state and condition of the mind.

In the lower grades of felony, in which the intent is an essential element of the offence, evidence of drunkenness is always admissible. Thus, in a prosecution for passing counterfeit money, guilty knowledge must be shown, and in the absence of it there is no offence. An honest man may knowingly have a counterfeit bank bill in his pocket, and may innocently pass it; and if he were indicted for passing it, inasmuch as the criminality of the act depends on the knowledge and the motive, the law would be cruel and abhorrent to our sense of justice that would deny him the right to show that he was so drunk at the time that he could not tell a good bill from a bad one. No reason is perceived in principle or public policy why less humanity should be exhibited in the administration of the law concerning higher offences, and, in my opinion, the substance of the instruction asked by the defendant should have been given.

THE STATE, TO THE USE OF GRIFFITH *et al.*, Respondents,
v. HOLT *et al.*, Appellants.

1. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond.

Appeal from Hannibal Court of Common Pleas.

Allen, Green, and Harrison, for appellants.

Dryden, for respondents.

I. The judgment of the county court was conclusive upon the administrator and upon his securities. (1 J. J. Marsh. 176 ; 7 Barr, 265 ; 5 Indiana, 204 ; 20 Pick, 58 ; Rapelye v. Prince, 4 Hill, 123.)

NAPTON, Judge, delivered the opinion of the court.

The plaintiffs, as assignees of the distributees of Nancy Wilson, deceased, obtained an order on the county court of Marion county for distribution to them, by the administrator, of a certain sum of money as assets of the estate ; and upon an appeal to the circuit court this order was confirmed. This suit was against the administrator and his securities for a breach of his official bond in not paying over according to said order or judgment ; and the question was, whether the securities were bound by the judgment, or were at liberty to show that the administrator had no assets in his hands, notwithstanding the judgment aforesaid.

The civil law regarded the relation of principal and surety as creating such a privity of interest as made the surety responsible for whatever bound the principal ; but the security was allowed to contest the liability of the principal in any action against the latter, and to appeal from the judgment, if it was unfavorable. (6 Johns. 158 ; Pothier, part 4, ch. 3.) The general rule of the common law is undoubtedly otherwise. A

State v. Holt.

judgment by the common law binds only parties and privies—privies in blood, in estate or in law; and as a security has no opportunity of contesting the propriety of a judgment against his principal, nor of appealing from it after it is rendered, he is not in general bound by it. Hence, in North Carolina, in the case of Kellar v. Bowell & Campbell, 4 Hawks, 37, the supreme court of that state decided that a recovery against a guardian was not even evidence against their securities in an action brought against them on that judgment to subject them on their bond for the default of their principal; and in McBride v. Clark, 2 Hawks, 43, the same court determined that the record of a recovery by a creditor of an intestate against his administrator was inadmissible as evidence in a suit by the creditor against the securities. So in Beal v. Beck, 3 Har. & McHen. 242, the supreme court of Maryland decided that in debt upon a sheriff's bond against a security, a judgment against the sheriff for the same cause of action was no evidence against the surety. In Drummond v. Ex'r of Prestman, 12 Whea. 515, the supreme court of the United States, in the case of a guaranty, held that a judgment confessed by the principal was *prima facie* evidence against the security in an action against him on his guaranty. Disapproving the decision of Beale v. Beck, they still admit that the judgment in that case against the sheriff would not be conclusive against his securities. In Pennsylvania, the decrees of their orphans' courts are held conclusive against the securities of the administrator; but the courts have construed the statutes there as allowing the sureties to appeal from decrees against their principal, and, if they so desire, to become parties in the original proceedings in the orphans' court. (Garber v. Commonwealth, 7 Barr, 265.) In Massachusetts, the case of Heard v. Lodge, 20 Pick. 53, decides that a judgment against an administrator was conclusive in a suit against him and his securities for failing to pay it, unless the securities could show that it was obtained by fraud or collusion. The court says that the duty the securities have assumed is, "that their

State v. Holt.

principal will pay on demand all debts ascertained by order of a court of law against him as administrator, if the estate be solvent. His failure to make payment is a breach of the bond. This opinion was followed by the supreme court of Indiana, in 1854, in *Solyer v. The State*, on the relation of *Taynor*, 5 Porter, 203. In Kentucky, the same principles was held in *Hobben & Churchill v. Middleton*, 1 J. J. Marsh. 179. The court of appeals say: "The responsibility of securities being incidental and collateral to that of the principal, a judgment in favor of a creditor against the administrator concludes the securities as to the existence and character of the debt thus ascertained, and can not be questioned or reviewed in a suit on the official bond." In Virginia, the court of appeals, in the case of *Munford v. Overseers of the Poor*, 2 Rand. 315, held, that a judgment against the sheriff was not conclusive in an action against his securities. But, in that case, Judge Green, in commenting on the case of *Braxton v. Winslow*, 1 Wash. 31, intimated his opinion that a judgment against an *executor*, so far as it went to establish a demand against the estate, could not be controverted by the sureties in a suit on his official bond, for the reason that the judgment, whether right or wrong, until reversed, bound the assets, and by the statute the executor was bound to apply the assets to the payment of said judgment; and his failure to do so might well be regarded a forfeiture of the bond, the condition of which was that the executor should administer the assets *according to law*.

These cases are sufficient to show that the courts of this country have not been very uniform in their application of admitted principles to different cases as they have arisen. The diversity may however, to some extent, be attributed to different kinds and degrees of liability which securities have assumed; for, although the relation of principal and security existed in all these cases, yet the character of responsibilities assumed in each may have been, and certainly in some of them were, very different. Thus, the Virginia court, although holding that a sheriff's securities might impeach a

State v. Holt.

judgment against their principal in a subsequent suit on that judgment against them, still seem to concede that it would not be so in an action against the securities of an executor, for the reason that their undertaking was that the executor could pay all judgments against the estate so far as there might be assets in his hands. And the case in Massachusetts, 26 Pick. 53, is also based upon the construction of the executor's bond, which in its terms was very similar to ours. Allowing for these differences, there is still, it must be conceded, a wide gap between the decisions in North Carolina, which hold these judgments against the principal no evidence at all in a suit against the securities, and those in Kentucky and Massachusetts and Indiana, which declare them to be conclusive.

The condition of the bond sued on in this case is, in accordance with our statute, that "the said Armstrong should faithfully administer said estate, account for, pay and deliver all money and property of said estate, and perform all other things touching said administration *required by law, or the order or decree of any court having jurisdiction.*" This is the contract into which the securities have entered. There is no reason why parties should not be allowed to obligate themselves to abide by the result of a suit between others, and if the contract in this case can be fairly construed as imposing such an obligation, there is no hardship in enforcing it. Such an obligation does not arise out of the mere relation of principal and surety, but springs from the express stipulations of the enactment. Thus, where a mortgagee sold his mortgage and covenanted with his assignee that it should produce upon foreclosure a certain sum of money, and, if it did not, he should make up the deficiency; the court held the decree of foreclosure and the amount found due in that decree conclusive upon the mortgagee, although he was no party to the proceeding. (*Rapelye v. Prince*, 4 Hill, 121.)

The plaintiffs here show an order or judgment of the county court of Marion county for a specific sum of money, which

State v. Shapleigh.

the court find and adjudge to be assets of the estate of Wilson in the hands of the administrator, and which they order to be paid over to the plaintiffs as assignees of the distributees of that estate. They allege that the administrator has not paid this sum in accordance with the order of the county court. The defendants admit the judgment and admit that the administrator has not paid the money, but they propose to show that this order or judgment of the county court was wrong; that, in fact and truth, the administrator had no assets in his hands. In other words, they propose to try over the very questions of fact and law determined in the county court, upon the ground that they were not parties to this proceeding, and without any allegation of fraud or collusion in obtaining the judgment. Our conclusion is, that sound public policy and the practical attainment of justice will be best subserved by letting the judgments of the county or probate courts be conclusive on the securities, except in cases where fraud or collusion is shown.

Judgment affirmed; Judge Richardson concurring. Judge Scott absent.

THE STATE, Respondent, v. SHAPLEIGH *et al.*, Appellants.*

1. So long as goods imported into one of the United States from a foreign country remain in the original unbroken package, the importer may sell the same, in that form, without first taking out a license from the state authorities; a state law requiring him first to take out a license would be in conflict with the constitution of the United States.
2. The act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1072), does not, when properly construed, require the importer of foreign goods to take out a license to authorize him to sell the same in the original packages.

Appeal from St. Louis Criminal Court.

Gamble, Shepley and Hannegan, for appellants.

Mauro, (circuit attorney,) for the State.

* This case was decided at the March term, 1858, of the supreme court.

RICHARDSON, Judge, delivered the opinion of the court.

The defendants were indicted for selling goods as merchants without license. The indictment contains but one count, which charges that the defendants, as partners, on the first day of July, 1856, and on divers other days and times, between that day and the day of finding the indictment, unlawfully did deal, as merchants, without license, at a place occupied by them in St. Louis, in selling hardware not the growth, produce or manufacture of this state, and not unmanufactured articles, the growth or produce of other states.

The defendants demurred to the indictment, but the demurrer was overruled, and they then pleaded not guilty, and under a provision of the revised statutes of 1855, p. 1189, the issue was tried by the court, with the consent of the attorney for the State and the defendants. The facts were agreed, and are as follows: "It is admitted by the defendants that during the time covered by this indictment, the defendants, as co-partners, were engaged in doing business as merchants, and that they did deal in the selling of goods, wares and merchandise at a store occupied by them for that purpose, at the county aforesaid, without a license therefor; and that, in their dealing as merchants aforesaid, they did sell goods, which were of the growth, produce and manufacture of foreign countries, imported by defendants into the United States, and on which they paid the duties to the United States, and which were sold by them in the original unbroken packages as imported; and that they sold no other goods than as above specified, and that the goods were as described in the indictment." There was no other evidence.

The defendants asked the court to declare the law to be "that if the defendants neither received for sale nor sold at their store in St. Louis any other goods except such as were imported by them into the United States from foreign countries, and on which they had paid the duties to the United States on their importation, and which were sold by them in the original unbroken packages, as imported, then the defen-

State v. Shapleigh.

dants are not guilty, and the court will so find." But the court refused to give the instruction, and declared the law thus: "If defendants were co-partners, doing business as merchants, and during the time covered by the indictment did, at St. Louis county, deal in the selling of goods, wares and merchandise, as described in the indictment, the growth, produce or manufacture of any foreign country beyond the limits of the United States, at a store occupied by them for that purpose, without a license authorizing them to deal, they are guilty as charged in the indictment. For whether the merchandise sold by defendants was sold in the original or unbroken packages, and whether defendants themselves imported the goods into the United States and into this state from any foreign country without the limits of the United States, and paid the legal import duties of the United States charged upon the same, are immaterial questions in this prosecution."

The defendants were found guilty, and have brought the case into this court by appeal.

All the legislation of the state that affects this case is contained in the act to tax and license merchants, approved December 11, 1855. The first section defines a merchant to be any person or co-partnership of persons who shall deal in the selling of goods, wares and merchandise, at any store, stand or place occupied for that purpose. The next section prohibits any person from dealing as a merchant without a license first had and obtained according to the requirements of the act, under the penalty of forfeiting, for every offence, not less than fifty nor more than five hundred dollars, to be recovered by indictment. By the third section merchants are required to pay an *ad valorem* tax, equal to that which is levied on real estate, upon all goods, wares and merchandise purchased by them, except such as may be the growth, produce or manufacture of this state, and except such unmanufactured articles as may be the growth or produce of other states. The fourth section prescribes that "any person or co-partnership of persons applying for a license to

State v. Shapleigh.

vend merchandise shall, before he or they shall receive such license, execute a bond to the state with two or more good and sufficient securities, who shall be freeholders at the time, conditioned that he or they will, on or *before the first day* of November next following, pay to the collector of the proper county the tax due upon such license." It is made the duty (sec. 6) of every person or co-partnership of persons, on the first day of November of each year, who shall have obtained a license as provided in the previous section, to file in the office of the clerk of the county court, in which the license may have been granted, a statement of the amount of all goods, wares and merchandise received for sale by him or them within the year then ending, excepting such as may be the growth, produce or manufacture of this state, and excepting such unmanufactured articles as may be the growth or produce of other states; and the seventh section requires that the statement shall be verified by affidavit.

It is admitted that during the time covered by the indictment the defendants only sold, in the original unbroken packages as imported, such goods as were of the growth, produce and manufacture of foreign countries, imported by them, and on which they paid the duties to the United States; and the question now to be decided is, whether the legislature of this state can consistently with the constitution of the United States require the importer of foreign merchandise to take out a license before he can lawfully sell the same in the condition in which it was imported.

This identical question was before the supreme court of the United States, in the case of *Brown v. State of Maryland*, 12 Wheat. 419, and it was decided by that court that the exercise of such a power by a state was repugnant to that clause of the constitution which declares that "no state shall lay any impost or duties on imports or exports," and also to the clause which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In that case *Brown* was indicted for violating an act of the legislature of Maryland, which

required that all importers of foreign merchandise, selling the same by wholesale, bale or package, hogshead, barrel or tierce, should take out a license before they were authorized to sell. The opinion of the court was delivered by Chief Justice Marshall, and it was held that an impost or duty on imports was a custom or tax levied on articles brought into the country; and though it was most usually secured before the importer was allowed to exercise the rights of ownership over them, it would not be less an impost or duty if it were levied on the articles after they arrived; and that the practice of levying or securing the duty before or on entering the port did not limit the power to that state of things; that imports are things imported, the articles themselves, which are brought into the country, and that "a duty on imports" then was not merely a duty on the act of importation, but was a duty on the thing imported; that an article imported under the authority of an act of Congress continued to be a part of the foreign commerce of the country while it remains in the hands of the importer for sale in the original bale or package in which it was imported; that the right to import necessarily carried with it the right to sell the imported article in the bulk and shape in which it was imported; and that no state, by direct assessment or by requiring a license before the importer was permitted to sell, could impose any burdens on him or the property beyond what the law of Congress had imposed; and that this right continued so long as the package was unbroken and remained the property of the importer; but that when the original package was broken up for use or for retail by the importer, or passed from his hands to a purchaser, it ceased to be an import or a part of foreign commerce. The learned judge then concludes, that "any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the act of Congress, which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential

State v. Shapleigh.

part of that regulation and principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation."

This case came under review in the license cases, (5 How. 504,) and the passenger cases, (7 How. 283,) and instead of being overruled, as has been asserted, it was expressly approved and affirmed by a majority of the judges, so far at least as it maintains the exclusive power of Congress over foreign commerce. Chief Justice Taney, in the license cases, observes, that he argued the case of *Brown v. Maryland* for the state, and, though he thought at the time that the court restricted the powers of the state more than a sound construction of the federal constitution warranted, that further and more mature reflection had convinced him that the rule laid down by the court was a safe and just one, and perhaps the best that could have been adopted for preserving the rights of the United States on the one hand, and of the state on the other, and preventing collision between them. And he then remarks that "goods imported, while they remain in the hands of the importer in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the state usually taxed for the support of the state government; * * * and a tax upon them while in this condition for state purposes, whether by direct assessment or indirectly by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a state."

This case falls directly within the principle established in *Brown v. Maryland*, and as long as that case stands in the court that decided it, it is our duty to respect it. State legislation must yield to the commanding authority of the constitution of the United States, and whilst in construing our own laws and constitution we recognize no higher authority than this court, we feel bound in all judicial questions affected by the laws of Congress and the federal constitution to follow the decisions of the supreme court of the United States,

State v. Shapleigh.

whose duty it is to expound them. Therefore, as we are bound by the decisions of that court on such questions, whether as individuals we concur or not in their reasonings or conclusions, it is unnecessary for us to extend this opinion by any views of our own, either in favor of or against the doctrine of *Brown and Maryland*. It is decisive of this case, and that is sufficient for us.

It is not necessary, however, for the decision of this case to declare the statute unconstitutional on which the indictment was framed, for it may stand and be executed in perfect harmony with this opinion. The act does not in terms declare that the importer of foreign merchandise shall take out and pay for a license to secure the privilege of selling, when he proposes to sell only in the original package; neither does it require the merchant to include in his statement goods expressly exempted by the constitution of the United States from the burdens imposed by state laws on other goods; and it will not be presumed that the legislature sought to do what it had no power to do, or that it attempted to abridge or invade private rights secured by the paramount law of the land. But if the importer breaks up the original packages for sale or for use, or changes the form in which they were imported, or they pass into second hands, the goods will lose their distinctive character as imports and become subject to the taxing power of the state, and in such cases nothing that has been said will protect an article so acted upon by the importer.

This view of the subject was taken by this court at an early day, in the case of *The State v. Tracy & Wahren-dorf*, 3 Mo. 3. The defendants in that case were indicted for violating the act of March 1st, 1825, which required that all merchants should pay a tax on their whole stock in trade except such goods as were the growth, produce or manufacture of this state; and provided that before any person should receive a license to vend merchandise, he should deliver to the collector of the proper county a complete statement in writing of all the goods, wares and merchandise, except as

Moreau v. Branham.

aforesaid, received at his store, &c. No exception was made by the act in favor of imported goods. It was objected that the indictment was defective because the offence charged was not necessarily unlawful, inasmuch as the selling of goods without license was legal or illegal according to the kind of goods sold and the manner of selling them. But the court, recognizing the binding authority of *Brown and Maryland*, held the indictment sufficient, and that if the defendants sold only such goods as they could lawfully sell without license from the state, their defence would be available on the trial, where "they could move the court to exclude all evidence of such sales as they might lawfully make.

In our opinion the demurrer was properly overruled; but the court ought to have given the instruction prayed by the defendants, and refused the instruction that was given. All the facts being admitted, the case stood as upon a special verdict, on which the defendants were entitled to a judgment in their favor. Judge Scott concurring, the judgment of the criminal court will be reversed, and the defendants discharged from their recognizance.



MOREAU *et al.*, Appellants, v. BRANHAM *et al.*, Respondents.

1. A sheriff's deed must be under seal; if not sealed, a court of equity can not aid its imperfect execution; nor should a court presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted by mistake to seal the deed.

Appeal from Ste. Genevieve Circuit Court.

The facts sufficiently appear in the opinion of the court. (See also *Moreau v. Detchmندی*, 18 Mo. 522.

Frissell and Detchmندی, for appellants, cited *Chouteau v. Borlando*, 20 Mo. 486; 2 Stark. Ev. 663; 5 Mo. 281; *Moreau v. Detchmندی*, 18 Mo. 530; *Craig v. State of Missouri*, 4 Peters, 436.

Moreau v. Branham.

Noell, for respondents.

I. The sheriff's deed was upwards of thirty years old, and that, together with the other facts of the case, warranted the court in presuming the deed to have been sealed. (Taylor on Evidence, § 104; 1 Greenl. Ev. § 144; Matthews on Presumptions, § 35, 36, 39.) There was sufficient proof of a sale by the sheriff to make a good equitable defence independent of any deed. (*Dessaunier v. Murphy*, 22 Mo. 95; *Best on Presump.* 76, 81.) The plaintiffs' action was barred by limitation.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs brought ejectment for a tract of sixteen hundred arpens confirmed to Pascal Detchmendy, their ancestor, against Danville James and William Branham. After the commencement of the suit, M. Maller, Francis X. Dahmen and Francis Burlando, on their application, were made defendants, and filed their answer. They averred in their answer that in the lifetime of Pascal Detchmendy a judgment was recovered against him in the circuit court of Ste. Genevieve county, on which an execution was issued directed to the sheriff of that county, who levied on and sold, in May, 1823, his interest in the land in controversy, and that St. Gemme became the purchaser; "that said sheriff undertook to make to said St. Gemme a deed for said land, but by mistake omitted to seal the same so as to make it legally sufficient to pass the legal title thereof." They further averred that by mesne conveyances they had become the legal and equitable owners, for a valuable consideration, of all the right acquired by St. Gemme at the sheriff's sale; and "that in consequence of the said mistake and omission the legal title to said land had remained in said Pascal Detchmendy and his heirs after his death;" and then asked, "that the legal title remaining in them be divested and that the same be vested in respondents." The original defendants also filed an answer, in which they admit that they

Moreau v. Branham.

entered into the possession of the whole tract, but deny that the plaintiffs are entitled to any interest in it; that the title before and at the commencement of the suit was in Maller, Dahmen, Burlando and John Bullier, who, and those under whom they claim, had had possession for more than twenty years; and "that they entered into the possession of said land, and retain the same under license from said M. Maller, Francis X. Dahmen, Francis Burlando and John Bullier."

The court found the facts and declared as a conclusion of law that the instrument executed by the sheriff to St. Gemme was a valid conveyance of Pascal Detchmendy's interest in the land, and "that the presumption arising from the proof of possession, taken in connection with all the other facts found, established that the instrument was a sealed instrument."

The character and legal effect of the instrument executed by the sheriff to St. Gemme was considered by the court in the case of *Moreau v. Detchmendy*, 18 Mo. 522, where it was decided that a conveyance by a sheriff of land sold under execution could only be by deed under the seal of the officer, and that the court was precluded from considering the question whether the evidence justified the presumption that the instrument was sealed, because the circuit court had found it was not sealed. In this case a stronger objection is interposed by the statement in the answer of the principal defendants, that "the sheriff by mistake omitted to seal the deed so as to make it sufficient to pass the legal title." A court would hardly be justified in presuming the existence of a material fact against the express admissions of a party that it did not exist, and any presumption that might be indulged, from the evidence in this case, that the instrument was sealed, is overcome by the positive statement in the answer of the parties invoking the presumption that it never was sealed.

If the Branhams asserted title to the land or any part of it exclusively to themselves, or in common with others, and not a joint interest, but a mere community of interest with the other defendants, then the admissions of their tenants in

Allen v. Moss.

common or co-defendants would not prejudice their rights or be received in evidence against them. (1 Greenl. Ev. § 176.) But in their answer they do not claim title, but on the contrary they disclaim it, and say that the title is in Mal-ler, Dahmen, Burlando and Bullier, under license from whom they entered and retain possession.

The other judges concurring, the judgment will be re-versed and the cause remanded.

ALLEN, Appellant, v. MOSS, Respondent.

1. By the Spanish law a verbal sale of immovable property was valid; to con-stitute such a sale valid it was not necessary the vendee should take pos-session, though taking possession would be strong corroborative evidence of such a sale.
2. The eighth section of the act of October 1st, 1804, (1 Terr. Laws, p. 47,) requiring all deeds and conveyances to be recorded under the penalty of being adjudged fraudulent and void against subsequent purchasers and mortgagees, did not overthrow the rule of the Spanish law making verbal sales of land valid.
3. Where a deed of conveyance purports to have been executed by making a mark or cross and has been attested in the same manner, the 27th section of the act of March 25th, 1845, (R. C. 1845, p. 223,) did not authorize the granting of a certificate of proof of such a deed.
4. Where a document is admissible in evidence for any purpose, it should not be excluded; it devolves on the opposite party to call on the court to state and explain to the jury how far and for what purposes it is evidence.
5. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.)
6. Under the act of July 3, 1807, (1 Terr. Laws, p. 120, § 45,) a sheriff's deed unacknowledged in court was ineffectual to pass the title to the purchaser; the authority of the sheriff being statutory, it should have been strictly pursued.

Appeal from Jefferson Circuit Court.

The facts are set forth with sufficient fullness in the opinion of the court.

S. T. Glover, for appellant.

I. The court erred in receiving as evidence the transcript

Allen v. Moss.

of the record on the claim of Smirl. It could not be used as evidence of title in any way; nor could the supposed deeds in said transcript contained be received as evidence against the plaintiff without some proof of their execution. The court erred in receiving the originals of said supposed deeds when offered by the defendant as evidence in connection with the affidavits of William Moss and Claibourne Thomas. They were no evidence of the execution of said deeds. (See R. C. 1845, p. 222, § 22.) The act of February 2, 1847, (Sess. Acts, 1847, p. 95,) is no help to this testimony. The court erred in instructing the jury, on motion of defendant, that prior to 1816 no writing was necessary to a sale and conveyance of land. (See 1 Terr. Laws, p. 47, 178.) Instructions No. 5, 6 and 8 were erroneous. The court erred in not holding the unrecorded deeds void as against subsequent purchasers, for value, who recorded their deeds after the lapse of time mentioned in the statute. The execution of the deed of Ware and Clark and Brinley was legally proved. (R. C. 1855, p. 726, § 18.) The court erred in not giving the instruction asked by plaintiff, with respect to the plaintiff's deed to Clark. When Clark joined Brinley in purchasing the land from Ware, he was estopped to deny that the deed of Ware conveyed the land to himself and Brinley in 1815.

Noell, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The foundation of this suit is a settlement right under the second section of the act of Congress of March 2d, 1805. The settler was Hardy Ware. In 1805 or '6, James Smirl, assignee of John Brinley, who was assignee of Hardy Ware, presented the claim to the board of commissioners, who in 1806 rejected it for want of actual inhabitation on the 20th December, 1803. This claim might have been confirmed, as it appears from the evidence, under the third section of the act of June 13, 1812; but, as no steps were taken to effect

Allen v. Moss.

that object, it can not now be sustained as a confirmation under that section. Under the seventh section of that act, William Russell, as agent for the claimant, gave notice to the recorder that the legal representatives of Hardy Ware claimed eight hundred arpens of land in the district of St. Louis, on the Meramec river. This claim embraced the land in controversy. It was filed on the 12th November, 1812; was reported for confirmation by the recorder and confirmed by the act of 29th April, 1816. It was confirmed to the legal representatives of Hardy Ware. On the 11th day of August, 1815, Hardy Ware conveyed the claim to William Clark and John Brinley, by a deed recorded on the 23d of September, 1816, the northern half to Brinley and the southern half to Clark. On the 9th day of December, 1815, John Brinley conveyed his part to William Russell. This deed was recorded on the 13th day of December, 1815. In February, 1855, Russell conveyed to Thomas Allen, the plaintiff, by a deed recorded the 30th day of May, 1855. Before the board of commissioners and the recorder, there was a deed from Hardy Ware to John Brinley and one from John Brinley to James Smirl, both dated in October, 1805, on a day of the month not named. The grantors in these deeds, as well as the subscribing witnesses, were crossmen. On the 6th day of December, 1848, the execution of these deeds was proved by two witnesses. This was done under the 27th section of the act concerning conveyances, with a view that the deeds might be admitted to record. All the parties to the deeds, the grantors as well as the witnesses, having signed with a cross, the witnesses could not prove the handwriting, but testified that they were present and saw the parties sign the deeds, and heard them acknowledge that they were their acts and deeds respectively. They also saw the subscribing witness sign his attestation with a cross. In July, 1811, William Clark recovered a judgment against James Smirl, on which an execution issued, by virtue of which the claim of Smirl was sold and Clark became the purchaser. The deed to Clark was never acknowledged in

Allen v. Moss.

open court. It was dated on the 7th March, 1812, and a great many years afterwards its execution was proved by a subscribing witness and it was put upon record. Allen, the plaintiff, did not show any conveyance from Clark to him, directly or indirectly, of the land purchased by Clark at the sheriff's sale. There was evidence offered to show the want of identity between the Hardy Ware who executed the deed in 1806, and the Hardy Ware who signed the deed in 1815 to Clark and Brinley. One of these deeds was signed with a cross, and the other without it. There was offered also evidence to show that William Russell, under whom the plaintiff claimed, was aware of the claim of Smirl to the land in dispute. The defendant claimed in right of one of the heirs of James Smirl. This suit is for the northern half of the claim conveyed in 1815 by Ware to Brinley.

The court, at the instance of the plaintiff, gave the following instructions: "1. The confirmation of the tract of land in controversy by the act of Congress of 29th April, 1816, was a confirmation to the legal representatives of Hardy Ware. 2. The legal representatives of Hardy Ware are such persons as are shown by the evidence to be legally entitled to the land confirmed by purchase from him, and showing a chain of valid transfers and conveyances from him. 3. Under the Spanish law that prevailed in the territory of Missouri until 1816, it was not necessary, in order to convey real estate, that there should be a deed or other instrument of writing executed by the seller to the purchaser, but it was competent and legal to sell and convey title to a purchaser by parol without deed or instrument. 4. The claim of Hardy Ware's representatives presented by William Russell, as agent, to Frederick Bates, recorder of land titles and acting commissioner for settling claims to land in the territory of Missouri, was confirmed by the act of Congress approved 29th April, 1816, and enures to the benefit of such person or persons as are shown to have title to the land acquired by a regular chain of valid transfers from him. 5. If the jury find from the evidence that the deed from Hardy

Ware to Clark and Brinley be a genuine deed and that it was recorded before the deed of Hardy Ware to Brinley and before the deed of Brinley to Smirl, then the title acquired under the first mentioned deed is a better title than that acquired under the two last mentioned deeds. 6. There is no evidence before the jury of a confirmation of any other claim, distinct from that of Hardy Ware's legal representatives. 7. There is no evidence before the jury of the confirmation of any claim to Smirl other than the one to which he may have shown title to as the representative of Hardy Ware. 8. In the absence of any evidence to the contrary, the jury will infer that the Hardy Ware who claimed and first settled the land in controversy is the same person mentioned in the various deeds in evidence."

The court refused to give the following instruction asked by plaintiff: "9. The deed from McNair, sheriff of St. Louis district, to Clark divests Smirl or his heirs of all title to the land thereby conveyed; and if the jury find that the land described in said deed is the same land claimed by defendant, then neither Smirl nor those claiming under him are legal representatives of Hardy Ware."

The defendant then asked the court to instruct as follows: "1. Under the Spanish law that prevailed in the territory of Missouri until 1816, it was not necessary, in order to convey real estate, that there should be a deed or other instrument of writing executed to the buyer by the seller; but it was competent and legal to sell and convey title to a purchaser by parol without deed or written instrument, provided the party purchasing took possession of the real estate so bought by him. 2. The claim of Hardy Ware's legal representatives, presented by William Russell as their agent, to Frederick Bates, recorder of land titles and acting commissioner for settling land claims in the territory of Missouri, was confirmed by the act of Congress of 29th April, 1816, and enures to the benefit of such person or persons as are shown to have had a valid title to the land on that day, and now is the property of such person or persons, or those

Allen v. Moss.

who may legally claim under them. The confirmation by act of Congress of 29th of April, 1816, was a confirmation to the person or persons on that day legally entitled to the settlement right of Hardy Ware, the original claimant in Spanish times. 3. If the jury believe from the evidence that the claim of Hardy Ware to the land in controversy was sold by him to John Brinley in 1805, and by said Brinley to James C. Smirl in the same year 1805, whether such sale was by deed or other instrument of writing, or by parol, and that the said Smirl took possession under such sale, and that the land confirmed to Hardy Ware's legal representatives and in dispute here was the same land so sold to Smirl, and that Smirl had not conveyed or disposed of the same in any way prior to the confirmation, and he was then alive, they are instructed that the confirmation was to said Smirl, as the legal representative of Hardy Ware; and unless the plaintiff shows a title derived from him or those legally claiming under him, they will find for the defendant. 4. If the jury find from the evidence that Hardy Ware sold his claim to the land in controversy prior to the date of the confirmation on the 29th of April, 1816, then the confirmation was to such person as was the first legal purchaser from said Ware; and those who show themselves by evidence to be entitled thereto under such legal purchaser must recover in this action. 5. If the jury find from the evidence that at the date of the deed from Hardy Ware to Brinley and Clark, on the 11th of August, 1815, the said John Brinley had actual notice of the sale and conveyance by the said Hardy Ware to himself, said Brinley, and from said Brinley to Smirl in 1815, as evidenced by the deeds read in evidence by defendant, then the failure to have said last mentioned conveyance acknowledged or proved and recorded does not render them fraudulent or void as against said Brinley. 6. If the jury find from the evidence that William Russell at the date of the deed from John Brinley to William Russell, to-wit, the 9th of December, 1815, had actual notice of the sale and conveyance by Hardy Ware to John Brinley, and by said

Allen v. Moss.

Brinley to James C. Smirl in 1805, then such deeds are not fraudulent or void as against said William Russell. 7. The deeds from Ware to Brinley and from Brinley to Smirl, dated in the year 1805, having been proven and recorded prior to the 25th day of February, 1855, the date of the deed from Russell to the plaintiff, impart notice thereof to the plaintiff notwithstanding they may not have been proven and recorded within the time prescribed by law. 8. The jury may take into consideration the actual possession and occupation of Brinley and Smirl under the deeds of 1805 read by defendant, and also the facts stated by William Russell in the notice of the claim before the recorder of land titles in November, 1812, in determining whether said Russell had actual notice of the sale and conveyance of the claim to Brinley and from Brinley to Smirl in 1805. 9. If the jury believe from the evidence that the deed introduced by the plaintiff, signed Hardy Ware, and dated 11th August, 1815, purporting to convey the land in controversy to William Clark and John Brinley, was not executed by the same Hardy Ware who claimed the right to settle the land in Spanish times, they will find for defendant. 10. The plaintiff in this case can not recover for any interest in the land in controversy which Clark may have acquired under the sheriff's deed read in evidence." Of these instructions, the court gave those numbered 1, 5, 6, 8, 9 and 10, and refused those numbered 2, 3, 4 and 7.

The two instructions given by the court relative to the validity of sales of land without writing, under the Spanish government, were contradictory. That given for the plaintiff simply asserted the proposition that sales of land without writing were valid under the Spanish government. The instruction given for the defendant qualified this with the proviso that the party purchasing took possession of the estate bought by him. In the case of *Gonzales v. Sanchez*, 4 Mart. La. N. S. 457, which is the first reported in Louisiana in relation to this subject, we do not find any qualification of the rule, though it is said in that case that the purchaser

Allen v. Moss.

possessed and cultivated the land sold in the lifetime of the vendor. In the case of *Maës v. Gillard's heirs*, 7 Mart. N. S. 321, it is held that a verbal sale of immovables was valid under the Spanish government of Louisiana. The court remarks that "the evidence in this case, coupled with the uninterrupted possession of the vendee and his successor for nearly thirty years, satisfies us that La Cour did purchase as the defendants allege." In the case of *Ducrest's heirs v. Byeau's estate*, 8 Mart. N. S., it is said that "it has already been decided by this court, after much consideration, that by the Spanish law parol evidence was admissible to establish the alienation and acquisition of immovable property." In *Sacket v. Hooper*, 3 La. 107, it is said "that a verbal sale of real property, accompanied by delivery to and long possession of the vendee, was valid under the laws of Spain, has been already settled by this court in the case of *Gonzales v. Sanchez*, 4 Mart. N. S. 457." Upon the whole, we are of the opinion that the rule of the Spanish law relative to verbal sales of immovables was not like that of the common law, which made livery of seizin necessary to transfer a freehold estate; but that the taking possession was a strong circumstance in proof of such a sale, but not necessary to its validity. What would be a taking of possession must be determined from the state and condition of the immovable at the time of sale, and the purposes and objects for which it was intended. Land may be in such a state that immediate actual possession can not be taken of it. The evidence of possession must be the acts which were usually done in those times by persons claiming such lands. Where there is no proof of any possession nor evidence of any acts asserting a dominion over the property by the reputed purchaser, the allegation of a verbal sale would not receive much countenance from a jury. We are not aware that the eighth section of the act establishing recorders, passed in 1804, requiring all deeds and conveyances to be recorded, under the penalty of being adjudged fraudulent and void against subsequent purchasers or mortgagees, has been regarded as being in vari-

ance with the Spanish law on the subject of verbal sales. That act was simply designed for the protection of subsequent purchasers and mortgagees. The act to prevent frauds and perjuries, one of the objects of which was to prohibit parol sales of land, was not introduced until the 20th January, 1816. (Mitchel & wife v. Tucker, 10 Mo. 260.)

The court erred in permitting to be read, as recorded deeds, the conveyances of Hardy Ware to John Brinley and of Joseph Brinley to James Smirl, admitted to record on the proof of two witnesses under the 27th section of the act concerning conveyances. These deeds were both signed with a cross, and the attestation of the subscribing witness was also signed with a cross. The section referred to requires that the witnesses proving the execution of a deed in order to its being recorded, shall state on oath that they well knew the signature of the party whose name is subscribed to the deed; so they shall state that they personally knew the person whose name is subscribed to such instrument as a witness and knew well his signature. It can not be perceived how a deed subscribed with a cross can be proved under this section. There is no handwriting to the instrument, either of the grantor or subscribing witness. It can not then be embraced in the law. The testimony of the witnesses amply proved the execution of the deeds, had it been given in court on the trial after accounting for the absence of the subscribing witness. But the existence of the evidence should have been preserved under the act for perpetuating testimony. To suffer deeds to be proved in an *ex parte* proceeding by living witnesses who saw them executed, would be a very dangerous practice. The error of admitting these instruments as recorded deeds was not helped by the fact that they were ancient. The genuineness of ancient instruments is a fact to be found by a jury. The court by suffering the instruments to be read as recorded deeds, withdrew from the jury the consideration of the question whether their execution was proved as ancient instruments. Under all the circumstances, they might have been submitted to the jury, who

Allen v. Moss.

would have determined whether they were genuine ; but this was not done.

The copies of the deeds contained in the record, certified from the recorder's office, were certainly not any evidence whatever of title in James Smirl to the land in controversy. It is remarkable how often this question has arisen, and how little care seems to be taken in the trial of causes to avoid it. We have held that if a document is admissible as evidence for any purpose, it may be read, and it is the duty of the opposite party to call on the court to state and explain to the jury how far and for what purposes it is evidence, and to take care that the party using it obtains no unjust advantage by it ; and we do think the court ought to be very particular in this matter, for they must see how eagerly it is pressed on them, on one pretension, when the object of it is to prepossess the minds of the jury by evidence which is not admissible. As it was deemed important to affect William Russell, under whom the plaintiff claims, and who was active in procuring the confirmation, with notice of the existence of these deeds, we do not see any objection to their use for that purpose.

From what has been said, instructions numbered 5 and 6, given for the defendant, were erroneous, as the deeds and conveyances referred to in them were improperly before the jury, and the instructions assume that they were properly in evidence. Had the deeds been properly in evidence to the jury there would have been no objections to them.

The seventh instruction asked by the defendant and refused should have been given. Although the deeds from Hardy Ware to John Brinley and from John Brinley to James C. Smirl were improperly recorded as deeds, yet the 46th section of the act concerning evidence makes deeds, which have been proved or acknowledged but not according to law, impart notice to all persons of the contents of such deeds. The deed from Russell to Allen was executed and recorded after the deeds above referred to had been put upon the record.

Instruction number 8, given for the defendant, would be unobjectionable if it had in plain terms stated to the jury the deeds to which reference was made. There would be no objection to it if it related to the deeds read from the recorder's transcript, and which had only been read to affect Russell with notice.

We see no objection to the ninth and tenth instructions given for the defendant.

There was no error in refusing the instruction asked by the plaintiff in relation to the effect of the sheriff's deed to Clark. That deed was not acknowledged in court as the 45th section of the act of 1807 required; it was not effectual as an instrument until it was so acknowledged, and Clark acquired no interest in any land under it. The conveyance of lands by a sheriff on a sale under execution is a statutory power, and the statute must be pursued, otherwise the conveyance can not pass title. We have held that a sheriff's deed not under seal would not convey a title; so also that a defective execution of a sheriff's deed could not be aided by a court of equity. It seems that the party's remedy in such a case would be under the 49th section of the act of 1807 concerning the practice at law. (Ter. Laws, p. 105.)

The terms of this confirmation are not like any that have fallen under our observation. The confirmation is to "Hardy Ware's legal representatives;" it was filed, as has been stated, under the seventh section of the act of the 13th June, 1812, by William Russell, agent for the claimant, on the 12th November, 1812. Now Allen, the plaintiff, claims under a deed executed by Hardy Ware long after the claim was filed. As the claim was confirmed to Ware's legal representatives, must not those representatives have existed at the time of filing the same? Would one be a representative who obtained a deed from him in 1815? The act confirming the claim, it is true, did not pass until the 29th April, 1816; but must it not relate back and affect those only who were the representatives of Ware at the time of filing it? The claim itself is founded on the pretension that at the date of

State, ex rel., v. Thompson.

the filing Ware had conveyed away all his interest in it. Did he not stand in relation to it as any other person no ways connected in interest? If this is so, Allen claiming under Russell, who claimed under Ware by a deed executed in 1815, must show some agreement by Ware to convey made before the filing of the claim, otherwise he does not show himself a representative of Ware. If the deed of 1815 by Ware to Brinley and Clark was the execution of a previous valid agreement, Allen might be a representative of Ware, otherwise it is not seen how he can claim to be one.

As the case is made out by this record, Allen can derive no advantage from the deed of the sheriff to Clark. He shows no conveyance from Clark. Clark himself, as has been shown, acquired no title by that deed; there is, therefore, no ground for any estoppel. It is besides the well established doctrine of this court that a vendee may deny the title of his vendor, and protect himself by an adverse title acquired from another.

As the point in relation to the enurement of the confirmation was not made on the trial of the cause, and as it may be met by evidence, we are of the opinion that justice would be subserved by another trial. Both parties acted on the supposition, and their instructions assumed, that Ware might by a conveyance subsequent to the time of filing the claim for confirmation pass a title to a *bona fide* purchaser without notice of the previous conveyances by him.

Judge Napton concurs; Judge Richardson not sitting, having been of counsel.

THE STATE, ON THE RELATION OF MARTIN *et al.*, Respondents,
v. THOMPSON, *et al.*, Appellants.

1. The old Bank of Missouri, having accepted the provisions of the act regulating banks and banking institutions, &c. (see Sess. Acts, 1857, p. 14) established, as required by the 12th section of the 10th article of said act, a branch bank at Palmyra, in Marion county, and furnished to it a capital of

State, ex rel., v. Thompson.

\$62,500. The parent bank appointed all the directors, nine in number, there being no private subscription of stock at the time. Afterwards, books of subscription were opened at Palmyra, and \$62,500 in stock were subscribed; some of these shares were forfeited and only \$33,660 were paid in on the stock subscribed. The parent bank, claiming under these circumstances the right to appoint six out of the nine directors, ordered an election for the three remaining directors on the 1st of March, 1858. The directors of the branch bank also resolved that an election should be held for three directors on said day, and notice was given to that effect. An election was accordingly held and a large majority of the stockholders voted for five directors instead of three; a small minority voted for three persons as directors. The latter were declared duly elected. *Held*, 1st, that under such circumstances the parent bank was authorized, by the 15th section of the 10th chapter of said act above referred to, to appoint six of the directors, and that the private stockholders were entitled to appoint no more than three; that the furnishing of capital, within the meaning of said section, is not the subscribing of stock merely, but the payment of the same; 2d, that the election being legally an election for three directors only, the votes given for five directors were illegal and were properly disregarded, and the three directors voted for were properly declared elected.

Appeal from Marion Circuit Court.

Dryden and Lipscomb, for appellants.

Anderson, for respondents.

SCOTT, Judge, delivered the opinion of the court.

The old Bank of Missouri, having accepted the terms proposed by the act to regulate banks and banking institutions and to create the office of bank commissioners, stood incorporated under the provisions of that act. The 12th section of the 10th chapter of this law required the mother bank to establish seven branches—one at Palmyra, in Marion county, with a capital of not more than \$125,000. (Chap. 10.) In pursuance to this provision the mother bank established a branch at Palmyra and furnished it with \$62,500. There being no private subscription of stock at this time, the mother bank, under the 15th section of chapter 10 of the act, appointed all the directors, numbering nine. Afterwards during the year 1857—that in which the branch was located at Palmyra—books of subscription were opened at

State, ex rel., v. Thompson.

that place, and \$62,500 were subscribed by individuals in stock. Some of these shares were afterwards forfeited for the nonpayment of calls, and \$33,660 was paid in on the shares of stock subscribed. In this state of affairs, the mother bank, claiming the right to appoint six out of the nine directors to which the branch bank was entitled, and having appointed that number, ordered an election by the private stockholders for the three remaining directors on the 1st March, 1858. A controversy thereupon arose between the mother bank and the private stockholders as to the number of directors by which the mother bank on her part and the stockholders on their part should be represented in the board. The mother bank maintained that she had a right to appoint six of the nine directors, leaving three to be appointed or elected by the stockholders. The stockholders contended that they were entitled to elect five, the number to which the stockholders in all the branch banks directed to be established by the act were entitled. The directors of the branch bank passed a resolution, that, in pursuance to the order of the parent board and the notice given by the president of that branch, an election for three directors on the part of the private stockholders should be held on the first Monday in March, 1858, at the banking house. As has been observed, the members of this board were appointed by the parent bank and represented its views. In accordance with the above resolution, an election was held at the time and place appointed. At that election, those of the stockholders who sided in opinion with the mother bank voted for three directors. The stockholders who maintained their right to elect five directors voted for five accordingly. The stockholder's ticket, with five names upon it, received a great many more votes than the ticket with only three names. The average number of votes for the tickets respectively was 212 and 88. This result being reported by the judges of the election to the board, it was resolved that William H. Walker, William B. Phillips and Joseph W. Thompson, having received the largest number of legal votes, are hereby declared

State, ex rel., v. Thompson.

duly elected directors on the part of the private stockholders for one year next ensuing, and until their successors are appointed. The individuals above named are those whose names as candidates were on the ticket supported by those who maintained that only three directors could be elected by the private stockholders. This ticket, as has been already stated, received a less number of votes than the other ticket. Upon this, the five voted for as directors and who received the greatest number of votes caused an information in the nature of a *quo warranto* to be filed against the directors who were declared to have been duly elected, in order to oust them from their offices, which it was alleged they usurped. Upon a trial, the directors declared to have been duly elected were found guilty and fined; from which judgment they appealed.

Upon this state of facts, two questions are presented; first, whether the five directors were duly elected; and, secondly, what was the number of directors to which the private stockholders were entitled.

On the part of the defendants it was contended that, under the resolution, only three candidates could be voted for; that the private stockholders, by casting their ballots for more directors than were authorized to be elected by the resolution, denied its authority, and must be regarded as having acted without right or legal power; consequently, the votes given by them were illegal and void, and could not be counted. It can not be maintained that that is an election where the electors are permitted to vote for more persons to fill the office than are allowed by law. If such a course was tolerated, after the so called election it would be necessary to hold another in order to ascertain which of the number voted for shall have the office, as they all can not hold it. If a person, entitled to vote for three representatives only, votes for five, can it be known which three of the five he intended to elect? How are the judges of the election to record such a vote? If a person is authorized to choose one agent only, and he selects five, has he made any election? As but one

State, ex rel., v. Thompson.

only of the five can serve him, is it known which one of the five he has chosen? The fact that some have more votes than others does not prove that they are elected over those having a less number. Confine the votes to the legal number of candidates, and the result may be altered. If the result may be affected by such a course, it can not then be said that the election is a legal one. It is not like the case where each elector votes for whom he pleases, but confines his choice to the legal number of candidates. In that case, if a plurality elects, the persons having the highest number of votes are chosen. But where more candidates are voted for than are permitted by law, the fact that some have received more votes than others does not prove that they are elected. As each elector votes for more persons than the law allows, he does not designate those whom he would have to fill the office; and if all the electors act in the same way, can their choice of those who should fill the office be known? The objection to the act is, that the voters have not designated the persons for whom they voted. By voting in that way the judges of the election could not ascertain for which of the number the stockholders did vote, and would properly reject all such ballots. There may be no doubt that the majority of the stockholders in interest were opposed to those declared duly elected; but courts can only respect the will of individuals when it is embodied in the forms required by law. A candidate may receive only ten votes and be elected when there may be hundreds against him who have not expressed their voice in the way the law prescribes. As the stockholders wilfully and knowingly voted in disobedience to the resolution under which the election was held, they have no just ground of complaint. It is a matter of importance that offices should be filled; and if electors will knowingly cast their votes in an illegal manner, they can not object that those elected by the legal votes are not the choice of the majority of those entitled to vote.

It remains to be determined to what weight the parent bank was entitled in the directory of the branch at Palmyra

State, ex rel., v. Thompson.

in the election on the first of March, 1858. The 15th section of the 10th chapter of the act prescribes that "the president and directors of the branch banks shall be chosen in the manner required by the general law, in cases where the capital furnished by the parent bank and the stockholders at the branch bank is equal; and when the greater amount is furnished by the parent bank, the number to be elected by the parent bank shall be in the same ratio increased to a number not exceeding that allowed by the general law." It is maintained that under this section the branch bank at Palmyra, after it had subscribed an amount of stock equal to the capital furnished by the parent bank, was entitled to five, its full number of directors; that in relation to the branches of the other banks established by the act, stock subscribed is regarded as capital, and the branches, on such subscriptions alone being made, are entitled to the number of directors allowed by law; that the word "capital" should have a uniform signification throughout the act. The general provision in relation to branch banks is, that they shall have nine directors, four of whom shall be elected by the directors of the parent bank and five by the stockholders who shall have subscribed for stock at the place of the location of the branch. In regard to all the other banks than that of the State of Missouri, they are not required to establish branches until \$50,000 shall have been subscribed at the place of the branch unless three-fifths of their capital stock shall have been paid in, and the requisite sum shall not have been subscribed by the branch to authorize it to begin business, and the subscriptions reserved for the branches shall have been taken by the parent bank. When a branch bank begins business, the parent bank is never required to advance to it more capital than has been paid in on its stock subscribed. Thus it is seen that the branches, while having their five out of the nine directors, are required always to furnish as much capital as the parent banks unless on the happening of the contingencies stated above. These provisions then require that the branches shall furnish as much capital as the mother

State, ex rel., v. Thompson.

banks. The 14th section of the same chapter of the act directs that the parent bank may at any time, in its discretion, establish either or any of the seven branches, without the previous subscription of stock at the place of its location, but may withdraw the same unless an amount of stock, to be specified, shall, in the time required by the board, be subscribed and paid in by stockholders in the vicinity of the branch. This section, it will be seen, gives the bank authority to withdraw any branch established, unless a required amount of stock shall be subscribed and paid—a clear expression that it is not the subscribing of the stock alone that will enable a place to retain its branch, but the paying it in must follow the subscription in order to prevent a removal of it. The 15th section of the same chapter, which has been already copied, only preserves to the branches the number of directors to which they are entitled by the general provision concerning branches in cases where the capital furnished by the parent bank and the stockholders at the branch bank is equal; otherwise the directors are to be apportioned according to the amount furnished by the parent bank, if it exceeds the amount furnished by the branch. If the legislature intended that stock subscribed should be regarded as “capital furnished,” would it by the 14th section have authorized the removal of the branch, unless stock was not only subscribed but paid in? If the subscription of stock alone was regarded as furnishing capital, why remove the branch because it was not paid in? In the section referred to, the word “furnished” can not be predicated of stock. Subscribing stock is not furnishing capital. Could a bank do business on its stock alone? Certainly it was intended that the branches should furnish that with which banking transactions might be carried on. What was it to the parent bank that any amount of stock was subscribed unless it was paid in? Was it to furnish capital to be managed by those who had no interest whatever in it?

If the directors then were to be apportioned according to the capital furnished, it remains to determine the number to

Town of Potosi v. Casey.

which the parent bank and the branch were respectively entitled. The parent bank furnished \$62,500; then, under the general law, the bank, being entitled to four directors, each one of them would represent \$15,625, or, in other words, \$15,625 would entitle it to a director. If the branch bank furnished the same amount, it being entitled to five directors, each one would represent \$12,500, or \$12,500 would entitle it to a director. As however it only furnished \$33,600, it would not be entitled to three directors, \$37,500 being necessary for that purpose. But adopt the more equitable rule, and where the fraction is more than half allow it as a whole, and it would only be entitled to three directors.

Judgment reversed and proceeding dismissed; Judge Napton concurring.



THE TOWN OF POTOSI, Appellant, v. CASEY, Respondent.

1. In a suit instituted in behalf of a town, under the 14th section of the act concerning towns (R. C. 1855, p. 1528), to recover of an individual a tax levied on his property, the defendant can not show that there was inequality in the valuation by the assessor of the taxable property of the town.

Appeal from Washington Circuit Court.

Carter, for appellant.

Frissell, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The town of Potosi brought an action against the defendant, under the authority of the 14th section of the act concerning towns (R. C. 1855, p. 1528), to recover the corporation tax levied on his property. No instructions were asked or given, and the only question presented by the record for our consideration arises on the plaintiff's exception to the admission of improper testimony. The defendant was allow-

Dickey v. Tennison.

ed to prove, against the plaintiff's objection, that there was inequality in the valuation by the assessor of the taxable property in the town, and witnesses were permitted to give their opinions of the relative value of particular pieces of property, as that 'H.'s lot was appraised by the assessor at a less sum than O.'s, though it was worth greatly more. This evidence was inadmissible; for, if an assessment can be set aside and the right to collect taxes defeated by proof of this kind, there never was and there never will be a valid assessment in the state, for it is impossible to find two persons who will concur in all respects in their estimate of a particular piece of property, and of its value compared to another piece.

No other point is presented, but as the case must be retried, we may now say that we see no reason why the plaintiff ought not to recover.

The other judges concurring, the judgment will be reversed and the cause remanded.



DICKET, Appellant, v. TENNISON, Respondent.

1. Private property can not constitutionally be condemned and appropriated by the legislature to private use.
2. The "act to establish a neighborhood road in Washington county, approved December 8, 1855, (Sess. Acts, 1855, p. 466,) is unconstitutional.
3. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void.

Appeal from Washington Circuit Court.

This was an action in the nature of an action of trespass *quare clausum fregit*. The defendant justified under an act of the legislature, approved December 8, 1855, (see Sess. Acts, 1855, Adj. Sess. p. 456,) authorizing him to open and keep open a neighborhood road in Washington county. The proceedings under said act were adduced in evidence by the

Dickey v. Tennison.

defendant. The court instructed the jury that said special act was constitutional, and if complied with it was a justification of the alleged trespass.

Noell, for appellant.

I. The road which was authorized by the act was not a public road. (See 25 Mo. 258, 277.) It was not a road of necessity. (11 Mo. 513.) No notice was given to plaintiff of the proceedings to condemn. (26 Mo. 193.)

Frissell, for respondent.

SCOTT, Judge, delivered the opinion of the court.

Our constitution provides that no private property ought to be taken or applied to public use without just compensation. Whilst this provision recognized the right of eminent domain in the state for the public use, there is nothing which sanctions the doctrine that the property of individuals may be taken for private use with or without compensation. Such a right would be hostile to the existence of private property. If one individual could by law be compelled to transfer his property to another against his will, a great stimulant to the acquisition of wealth, which contributes so much to the prosperity of the state, would be taken away. Hence commentators on our form of government, whilst they acknowledge the right of eminent domain in the state for public use in its broadest terms, are unanimous in the opinion that private property can not be taken for private use. Some difference of sentiment may arise as to the application of this principle, but none deny or doubt its existence.

In order to determine this controversy, then, it will be necessary to consider the act under which the road was opened, the opening of which gave rise to the controversy, and to determine from its provisions whether the property therein authorized to be taken was for the public use. The act is found in the private and local acts of the adjourned session of 1855, p. 467, and is entitled "An act to establish

Dickey v. Tennon.

a neighborhood road in Washington county," approved December 8th, 1855. Names do not alter things, and when an act is unconstitutional in its essence, it can not be made valid by specious names or titles. But for the word "neighborhood" in the act it would never occur to any one but that the road was for the private use of the defendant alone. By it he is authorized and permitted to open and keep open a neighborhood road. The defendant himself is to mark out and report the road to the county court, who are then to appoint commissioners to assess the damages. The commissioners are to be paid for their services. The defendant is required to pay all damages assessed and all costs attending the matter, and the establishment of the road is made to depend on the performance of these conditions. It is obvious from these details that the existence of the road depends upon the will of the defendant. He is permitted to open it. This is unusual language to be employed in authorizing a road required for the public use. He is to pay all damages assessed and the costs of the proceeding. This is a wide departure from the usual mode of paying the damages for the opening of the ordinary public highways of the county. The commissioners themselves are to be paid by the defendant, as he pays all costs. How unjust is this to those who were injured by the opening of the road! One party to a controversy pays the judges, and their wages are at his discretion. Who would go before a tribunal when he knew that it was paid for its services by his adversary and the amount of its compensation fixed by him. The legislature, in denominating this a neighborhood road, intended it should not be a public one, else the ordinary language would have been used in authorizing its establishment, and its existence would not have been made to depend on the will of the defendant. In ordinary parlance, a neighborhood road is one exempt from all control of the law, and its existence depends on the will of those over whose land it passes. The defendant, not owning the land, would compel the owner to submit to a right of way, not from necessity but for his own interest or

Dickey v. Tennison.

gratification. It may be answered that all these objections might be urged against an act authorizing the building of a railroad. In a railroad charter, the public utility of the contemplated improvement is obvious. The legislature is the judge of the necessity of taking private property for public use, and when the courts can see that the object for which private property is taken is public use, they can not control the discretion of the legislature in determining on the necessity of the exercise of the right of eminent domain. In the act before us there is nothing which shows that the condemnation of the plaintiff's property was for the public use; and as we may determine from the act authorizing the improvement whether the property directed to be taken is for the public use, there is no reason why the same means should not be resorted to in order to ascertain whether it is not for private use.

In my opinion, the proceedings are void for the want of notice to the plaintiff. Unless he was notified it was impossible, from the terms of the act, that he could have notice. The term of the county court at which the defendant was to apply for the appointment of commissioners is not designated in the act. It could be made when the defendant saw fit to have it done; so the plaintiff, without notice, could not be in court, as he would not know when the application would be made. It does not appear from the report of the commissioners that he was notified; it does not even appear that his consent was solicited; but, from the report, it may be inferred that the commissioners acted behind his back, without giving him any notice. While the proceedings were thus as it were studiously concealed from the defendant, of what avail to him was the right of appeal secured by the act. How could it be exercised unless he was notified of the steps taken by the defendant? In giving a right to an appeal the statute must have contemplated that there should be notice to the party against whom the pleadings were had, otherwise he could not be benefitted by the right.

Nothing herein contained must be taken as expressing an

Spalding v. Mayhall.

opinion in hostility to the constitutionality of the act entitled "An act to enable persons to secure the right of way." (R. C. 1855, p. 1562.) That act contemplates nothing more than the regulation of the exercise of a right which existed without any statute, a right of way of necessity which every man enjoyed who owned lands surrounded by the land of others.

The judgment will be reversed and the cause remanded ; the other judges concur.

SPALDING, Plaintiff in Error, v. MAYHALL *et al.*, Defendants
in Error.

1. The term disseizin, as used in the third section of the act concerning forcible entry and detainer (R. C. 1855, p. 787), has not a technical meaning ; it applies to any entry, which is wrongful and without force, upon the actual possession of another.
2. In an action of unlawful detainer the merits of the title can in nowise be inquired into ; it is immaterial whether the intruder is a naked trespasser or enters under a paramount title ; the purchaser at a sheriff's sale under an execution is put to his ejectment if the defendant refuse to yield possession.
3. After a jury has returned a special verdict, the court should not resubmit the cause to them for a general verdict with instructions.

Error to Ralls Circuit Court.

This was an action of unlawful entry and detainer to recover possession of certain premises in the town of New London. On the trial in the circuit court, the jury, under the instruction of the court, found a special verdict, of which the following is the substance : That plaintiff erected the house on the premises in controversy and occupied the same up to September 17, 1855 ; that said premises had been purchased by Southworth and Wellman at a sheriff's sale under an execution against plaintiff Spalding ; that Southworth and Wellman in August, 1855, after their purchase, applied to plaintiff for possession and plaintiff promised to deliver the possession to them within three weeks ; that shortly after the

expiration of that time plaintiff moved to Hannibal, locking up the house and taking the key with him; that plaintiff loaned the key to one Mr. Farmer to get some property belonging to Farmer out of the house under an agreement that Farmer would return the key to him; that a few days afterwards Mr. Southworth procured the key from Farmer and took possession of the premises; that Southworth and Wellman sold the premises to one Shulmire and put him in possession of the premises; that Shulmire sold to one Ellis; that Ellis rented the same to defendants and put them in possession; that they remained in possession until the institution of this suit; that on the 8th of July, 1856, plaintiff served on defendants a demand in writing for the possession of the premises; that defendants failed and refused to deliver possession.

The plaintiff asked the court to instruct the jury "that upon the facts as proved by the jury in their special verdict the jury ought to find the defendants guilty in manner and form as charged in the complaint." The court refused so to instruct, but at the instance of the defendants instructed the jury "that if they believe the facts to be as found in the special verdict, the jury ought to find the defendants not guilty in manner and form as charged in the complaint." The jury found for defendants.

Porter and Harrison, for plaintiffs in error.

I. The plaintiff's cause of action is made out by the special verdict. The court should have so decided. (R. C. 1855, p. 787.) Southworth unlawfully acquired possession; his possession being thus unlawfully acquired, his transferring that possession could not relieve himself, or any holding mediately or immediately under him, from the liability imposed by law in plaintiff's favor. (See *Warren v. Ritter*, 11 Mo. 354; 1 Monr. 127; 2 Dana, 111; 4 Dana, 168.)

Southworth & Wellman, for defendants in error.

I. The possession of defendant was not obtained and continued wrongfully by disseizin. The possession of defendant can not be disturbed by Spalding.

Spalding v. Mayhall.

RICHARDSON, Judge, delivered the opinion of the court.

It is declared in the third section of the act concerning forcible entry and detainer that "when any person wrongfully and without force by disseizin shall obtain and continue in possession of any lands, tenements or other possessions, and—after demand made in writing for the deliverance of the possession thereof by the person having the legal right to such possession, his agent or attorney—shall refuse or neglect to quit such possession, such person shall be deemed guilty of an unlawful detainer." Lord Coke says: "A disseizin is when one enters intending to usurp the possession, and to oust another of his freehold;" but it was observed in *Warren v. Ritter*, 11 Mo. 354, that the term disseizin, which is strictly only applicable to freehold estates, was not employed in the statute in its technical sense, and was intended to apply to an entry which is wrongful and without force upon the actual possession of another; and the obvious design of the statute is, "to prevent the intrusion of one person on the lawful possession of another, without his consent, and to secure a peaceable possession from being changed without authority of law against the will of the occupant." (*Wunsch v. Grelet*, 26 Mo. 580.)

The 26th section of the act provides that the merits of the title shall in nowise be inquired into, for the law forbids an unlawful entry with or without title, and it is immaterial whether the intruder is a naked trespasser or enters under a paramount title, for if he has the right to the possession he must resort to the authority of law to obtain it. (*Warren v. Ritter*, 11 Mo. 354; *Brumfield v. Reynolds*, 4 Bibb, 388.) The purchaser of real estate under an execution is put to his ejectionment if the defendant refuses to yield possession; and, therefore, as the merits of the title can not be inquired into in this proceeding, *Southworth and Wellman* and those who claim under them occupy no better position than if they had entered without color of title. And the main question in the case is, whether the plaintiff was in the actual possession of

Moore v. Winter.

the premises at the time of the entry; for if he was, the defendants took shelter under their title.

The jury might infer, from the circumstance that the plaintiff promised to give up the possession and afterwards removed to Hannibal, leaving the house vacant, that he intended to abandon the possession; in which event he can not recover. But, although he moved away, if by retaining the key he intended to hold the exclusive possession to himself, it continued in him; for actual possession does not mean that the owner must remain continually on the land. (11 Mo. 354; 4 Bibb, 388.) It is a question of intention coupled with appropriate acts indicating a purpose to retain possession. This fact is not found in the special verdict.

The practice in this case was irregular. After the jury returned a special verdict, the court gave instructions and re-submitted the case to them, who thereupon returned a general verdict. If a special verdict finds the facts responsive to the issue on which a judgment can be rendered, the functions of the jury cease, and it is the duty of the court to give the judgment. (R. C. 1855, p. 1263, § 20.)

The other judges concurring, the judgment will be reversed and the cause remanded.

MOORE, Respondent, v. WINTER *et al.*, Appellants.

1. Where a person hires a slave for a year and the said slave is wrongfully taken out of his possession during the term of service, the measure of damages in a suit against the wrongdoer is the value of the services of the slave during the residue of the term, even though the suit should be instituted before the expiration of such term.

Appeal from Montgomery Circuit Court.

This was an action to recover damages for the alleged wrongful taking of a slave out of the possession of the plaintiff. One Christopher Carter hired a slave to one R. S. Brown for one year from the 1st of January, 1857. Carter

Moore v. Winter.

gave his note for the hire—one hundred and seventy-five dollars—with Sterling Winter as his security. Brown took possession of said slave and continued to hold possession of him until March 23, 1857, on which day he hired him to the plaintiff Moore for the remainder of the year. The defendants Winter and King on the same day took said slave out of the possession of plaintiff and detained him from plaintiff during the remainder of the year. This suit was instituted April 27, 1857. The court gave the following instruction: "2. If the jury find for the plaintiff, then they will assess the value of the services of the slave from the time of the taking to the termination of the year for which said negro was hired, and any other damage that they find from the evidence has resulted to plaintiff from such taking." The jury found for plaintiff.

Henderson, for appellants.

I. No damages could be allowed for any detention since the commencement of this suit. (1 Harp. 276; 6 Pick. 206; 1 Car. & Marsh. 431; 3 Jones, N. C. 215; 2 Bibb, 215; 2 Gilm. 688; 3 Denio, 283; 2 Burr. 1077.)

Jones & Hayden, for respondent.

I. The court correctly laid down the rule with respect to the measure of damages. (See *Garth v. Everett*, 16 Mo. 490.)

RICHARDSON, Judge, delivered the opinion of the court.

No circumstances of aggravation are shown in this case, and the action is therefore to be regarded as one of trover in reference to the measure of damages; (*Walker v. Borland*, 21 Mo. 289; *Sedgwick on Dam.* 558;) and in such cases the plaintiff is generally only entitled to recover the value of the property with interest. (*Polk v. Allen*, 19 Mo. 457.) If, however, the plaintiff has only a special property in the subject of the action, the value of the goods is not always the measure of relief, and he can generally only recover com-

Moore, v. Winter.

mensurate with the value of his interest, whatever it may be. Thus, if he has an estate for life or for a given number of years, the value of his interest will furnish the rule of compensation; (12 S. & Mar. 223;) and in this case, as the plaintiff had the right to the possession and services of the slave from the time he was taken away by the defendants to the end of that year, he ought to recover damages for the value of the services of the slave during the residue of the term. (Compton v. Martin, 5 Pick. 14; Hickok v. Buck, 22 Verm. 149.) In Compton v. Martin, the defendant hired to the plaintiff a negro man for two years, but a few days after the slave was put into the possession of the plaintiff, he returned to his owner and was sold, so that the plaintiff was deprived of his services. In an action of trover, the plaintiff was allowed to recover the difference between the amount fixed as hire and the profits of the negro's labor for two years. The defendant, in Hickok v. Buck, leased to the plaintiff a farm for one year and agreed to furnish a horse for the plaintiff to use upon the farm during the term. The horse was furnished, but was taken away by the defendant and sold before the expiration of the year. It was held that the plaintiff acquired a special property in the horse, and was entitled to recover, in an action of trover, damages for the loss of the use of the horse for the remainder of the year.

The first clause of the second instruction is equivalent to a declaration that the plaintiff could recover the value of his interest in the slave, and therefore properly prescribed the measure of damages. The instruction however goes further, and does not stop at laying down a rule that covers all the damages that the plaintiff was entitled to demand, but declares that he was entitled to recover for "other damage." The latter clause of the instruction invited the jury into a field of indefinite boundaries, for it did not indicate the kind of damages, whether actual, remote, or speculative, which it was proper for them to consider and allow in addition to the value of the plaintiff's interest in the share; and as the first

Twyman v. Twyman.

part of the instruction embraced every element to be considered in the estimate of damages, the latter part should have been omitted.

The judgment will therefore be reversed and the cause remanded; Judge Napton concurring. Judge Scott not sitting.

TWYMAN, Appellant, v. TWYMAN, Respondent.

1. After a husband or wife has been wronged in such a manner as would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offence.
2. The admissions of a party to a proceeding for divorce are evidence against him, but alone they are not sufficient to warrant a decree; they must be supported by other evidence.

Appeal from Monroe Circuit Court.

Howell, for appellant.

SCOTT, Judge, delivered the opinion of the court.

The evidence in this case is not sufficient to warrant a divorce. The specific acts of misconduct alleged in the petition, no doubt, if recent and supported by the necessary evidence, would, under our law, warrant a decree separating a wife from her husband. The main charges of cruelty alleged in the petition occurred some years before the institution of this suit, and there seems to have been a long cessation of injurious conduct on the part of the husband. In the language of those who write on the subject of divorces, there is such a thing as condoning marital offences. After one of the married parties has been wronged in a way that would warrant a divorce, if he or she voluntarily cohabits with the other party it is a condonation of the offence. However, an offence pardoned in this way will revive upon a subsequent violation of the marital duties. Considering the evidence in the cause, the plaintiff must have been under some

Twyman v. Twyman.

undue influence hostile to the defendant. Just before the beginning of this suit, she agreed to live with him if he would remove to the neighborhood of her friends. After he had in compliance with this understanding taken a portion of his goods to the house of his wife's mother, his wife refused to see him any more and invited him to leave her mother's, where she was then living, and where the goods removed had been temporarily left.

None of the grounds relied on for a divorce are supported by any other evidence than the expressed and implied admissions of the defendant, made at a time and under circumstances which show that, as his object was a reconciliation with his wife, he deemed it more advisable to acquiesce in her accusations than to alienate her by a contradiction of them. The chief witnesses, too, who testify to these admissions, seem to have been sent to the defendant to extract evidence by which the charges in the petition might be sustained, as the institution of this writ was simultaneous with the disclosures made by the witnesses. Dr. Crow proves an admission by the defendant that he had wronged his wife, but what those wrongs were does not appear; though we may infer they were not very serious, as he states in the same connection that the defendant informed him that he was not aware of the cause which induced his wife to leave him. It would be very unsafe to base a judgment on the evidence of Mrs. Davis, when we regard her feelings, the relationship between her and the plaintiff, and the suspicion, that arises from the circumstances of the case, that she had an agency in causing the alienation of feeling between the parties to this suit. She proves moreover nothing more than what she regarded as admissions by the defendant of the truth of the charges alleged against him. The admissions made, even if satisfactorily proved, are made in such a way and under such circumstances as fill the mind with mistrust in endeavoring to rest a decree for a divorce upon them. The admissions of a party in a proceeding for a divorce against him are evidence, but alone they are not made the foundation of a decree.

Twyman v. Twyman.

They must be supported by other evidence. There may be cases in which the court may be satisfied that the confession is genuine and sincere, from the circumstances under which it is made and the manner in which it is used, the defence made and the mode of conducting it. (*Holland v. Holland*, 2 Mass. 154; *Betts v. Betts*, 1 J. C. 197; *Bishop on Divorce*, 305-8.)

Although the appearances as to the relations between husband and wife are delusive, and neighbors and acquaintances may be deceived as to their real bearing to each other, yet it is singular that, if the treatment of the husband to his wife has been such and had been so long continued as would warrant a divorce, none of the numerous witnesses who were examined by the defendant, some of whom were in a situation to observe any ill-feeling, discovered any thing unbecoming a husband in the conduct of the defendant. The grandfather and grand-mother of the plaintiff, with whom (she being an orphan) she spent many years of her infancy, with whom she lived until her marriage, who made and received visits after the marriage, and who were on the most intimate and cordial terms with her, speak in the most favorable manner of the conduct of the defendant as a husband. As the plaintiff visited her grand-parents after her marriage, as she stood in relation to them both as a child and grand child, is it not remarkable that she did not disclose to them the wrongs which she endured. Other near relations of the plaintiff, who were examined as witnesses for the defendant, testify in warm terms of approbation of his conduct as a husband. Indeed, taking all the circumstances of the case together, it seems that the conduct of the defendant has been reviewed under unfavorable circumstances, and, long after it was past and should have been forgotten, has now been brought against him to effect a divorce.

Affirmed. The other judges concur.

Phillips v. Riley.

PHILLIPS, Appellant, v. RILEY, Respondent.

1. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.)

Appeal from New Madrid Circuit Court.

The following is the notice referred to in the opinion of the court: "Sir—You are hereby required forthwith to commence suit against Richard Phillips, principal in a certain note held by you, signed by said Phillips as principal and by the undersigned as security, dated 1st of February, 1855, and payable twelve months after date, for four thousand dollars, for value received. [Signed] Amos Riley."

U. Wright, for appellant.

I. Notice by security to sue a principal who is a non-resident of the state, may be disregarded by the creditor because not embraced by our statute. (18 Mo. 146; 7 Mo. 297. No extra-territorial activity can be imposed upon the creditor, nor within the state can any extraordinary process be exacted of him. The only right of the security is to hold the creditor to diligence according to the "ordinary course" of law.

S. T. & A. D. Glover and *R. S. Hart*, for respondent, cited *Indiana Laws*, 1838, p. 234; 5 Blackf. 311; Ill. Stat. 1856, p. 1083; 18 Ill. 249; 18 Ohio, 56; 2 Ky. Stat. 1834, p. 1441; 3 Dana, 160; 9 B. Monr. 432; 5 Leigh, 153; 17 Mo. 399; 18 Mo. 140; 7 Mo. 297.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff commenced a suit on the 21st of August, 1857, on a promissory note, executed by Richard Phillips as principal, and the defendant Riley as his surety, for four

Phillips v. Riley.

thousand dollars, due the 1st of February, 1856. There was no service on Phillips, and the plaintiff discontinued as to him, but the summons was served on the defendant the day it issued. The only defence set up was that the defendant on the 8th of July, 1857, had caused a notice to be served on the plaintiff requiring him to commence suit immediately against the principal in the note, and that he had neglected to commence suit within thirty days after the notice. The case was tried by the court without a jury. The only evidence offered on either side was the note, the notice and service thereof, the summons in the cause, and the testimony of the defendant himself that the principal in the note was a non-resident of the state; and on these facts judgment was rendered for the defendant.

There is no conflict in the testimony, but a total absence of any proof whatever to support the judgment. The notice of the 8th July did not simply require the plaintiff to commence suit on the note, but that suit should be commenced against Richard Phillips, the principal, who was a non-resident of the state. The defendant had no cause to complain that he was not sued sooner, and he could not by his notice compel the plaintiff to go out of the state to sue the principal. (Hughes v. Gordon, 7 Mo. 297; Perry v. Barrett, 18 Mo. 180.) There could be no dispute about the facts, for they are very few and simple, and the error of the court was clearly in the application of the law to the facts.

We all agree in the law of the case and that the judgment was for the wrong party; but Judge Scott thinks that nothing was saved by the plaintiff to authorize the interference of this court. Judge Napton concurring, the judgment will be reversed and the cause remanded.

Wiley v. Robert.

WILEY, Respondent, v. ROBERT, Appellant.

1. A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof in writing must be made to bind the parties.
2. A memorandum made by a deputy sheriff and signed by him of a sale of one of several lots in a partition proceeding, in which Louis Robert and others were plaintiffs, and one B. T. Adams defendant, was as follows: "Partition, Lands—Louis Robert v. B. T. Adams—Lot No. 11—274 80-100 a.—Louis Robert—\$10.50 per a.—\$2,885.40." Held, that this memorandum was sufficient to take the case out of the statute of frauds.
3. The sheriff can, in such case, maintain an action in his own name against the purchaser for the purchase money, although the latter may not have given a note therefor to the sheriff.
4. Where a sale in partition proceedings is made and the land embraced in the suit is bid off by one of the parties, the purchaser can not, by any agreement with any of the parties to the suit with respect to the land and the payment of the purchase money, affect the right of the sheriff to collect of such purchaser his lawful fees or enough of the purchase money to pay the costs and the portions of the purchase money belonging to those parties, if any, who do not enter into any agreement in the nature of a release with the purchaser.

Appeal from Jefferson Circuit Court.

This was an action brought by the sheriff of Jefferson county to recover from Louis Robert the amount bid by him for a certain tract of land at a sale in a partition proceeding, in which said Robert and others were plaintiffs and B. T. Adams defendant. The defendant denied in his answer that a memorandum in writing of the alleged sale had been made by any one lawfully authorized. The defendant also set up that after said sale it was agreed between the plaintiff in said partition suit and the defendant therein, Adams, that the latter should keep the land and compromise upon a price to be agreed upon; that Adams retained possession of said land; that plaintiff had not disturbed him, and was ready to carry out the agreement when Adams should require. This portion of the answer was stricken out on motion of plaintiff. The answer also set up that under the judgment in the partition proceeding defendant was entitled to one-

Wiley v. Robert.

fifth of the purchase money. The court refused to declare the law as follows, as asked by defendant: "The contract, as set out in the petition and as shown by the proof, not being in writing, nor any note or memorandum thereof, signed by the defendant nor by some person by him lawfully authorized, is void, and the plaintiff can not recover."

The court found for plaintiff, and gave judgment against defendant for the amount bid by him with interest, &c.

Whittelsey and Pipkin, for appellant.

I. There was no sufficient memorandum of the sale, so as to give the sheriff a right to enforce a specific performance of the contract. A sheriff's sale is within the statute of frauds. (2 Johns. 248; 8 Johns. 520, § 47; 3 Blackf. 472; 8 Blackf. 105; 8 Mo. 177; 2 Camp. 203; 5 B. & Ald. 333.) The terms of sale are not given. The lot bought is not sufficiently described. (3 Duer, 395; 1 Johns. 273; 14 Johns. 15; 7 East, 558; 16 Wend. 130; 7 Mo. 389.) The sheriff can not maintain an action for specific performance of a contract for the purchase of real estate. He has no such possession nor interest as will authorize an action. (10 Johns. 387.) The damages were excessive. The sheriff was entitled only to the interest he had — commissions and costs. One-fifth of the purchase money belonged to defendant. The court erred in striking out that portion of the answer setting up the agreement with Adams. (7 Mo. 569; 11 Mo. 659; 20 Mo. 81.)

Frissell and Green, for respondent.

I. The statute of frauds does not apply to sheriff's sales. If it does, the memorandum in this case is sufficient. Besides, the defendant does not deny the sale to himself nor his bid. (See Smith on Contracts, 36; Sugd. on Vend. 133; Hilliard on Sales, 185.)

RICHARDSON, Judge, delivered the opinion of the court.

A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof must be made to bind

Wiley v. Robert.

the parties. (Evans v. Ashley, 8 Mo. 177.) We think, however, that the memorandum made by the deputy sheriff in this case was sufficient for that purpose. The deputy states that the sheriff handed to him the advertisement and copy of the order of sale in the partition suit of Robert v. Adams, and directed him to proceed with the sale; that he acted as clerk, and Johnson as auctioneer; that the advertisement was first read and then the land was put up in parcels, and as it was struck off he immediately wrote on a memorandum the number of the lot sold, the name of the purchaser, and the amount of the bid. The memorandum was produced, and at the caption was written, "Partition, Lands. Louis Robert v. B. T. Adams." Then follows the number of the lot, the quantity it contains, the purchaser's name, the price per acre, and the aggregate; for example: "Lot No. 11—274 80-100 a.—Louis Robert—\$10.50 per a.—\$2,885.40." The title of the partition suit being placed at the head of the memorandum of the sale connected the papers in that case with the memorandum, for the purposes of this inquiry, as perfectly as if they had been specially referred to and made a part of it; and therefore it was not necessary to resort to parol evidence in order to connect other papers with it, to show the agreement of the parties and to establish a valid contract.

The sheriff was the agent appointed by law to make the sale ordered in the partition suit, and it was his duty to collect the purchase money and pay it over to the parties respectively entitled to it. If the defendant had complied with the terms of the sale, his note for the deferred payment would have been executed to the sheriff, (R. C. 1855, p. p. 1116, § 35,) which he could have collected by suit in his own name. This suit is not a proceeding to enforce the specific performance of a contract, but is simply an action of assumpsit for land sold; and, as the plaintiff was the trustee of an express trust created by law and the judgment in the partition suit, we see no reason why he can not maintain this action. For the fact that the defendant failed to give his

Wiley v. Robert.

note, as it was his duty to do, can not affect the right of the sheriff to sue him for the purchase money.

It seems that the defendant was entitled to four-twentieths and Adams to fifteen-twentieths of the proceeds of the sale in partition suit, so that the two together were entitled to nineteen-twentieths. The defendant set up in his answer that after the sale there was an agreement between him and Adams by which it was agreed that the latter was to take the land on terms to be afterwards agreed on between them. Now they could not by an outside arrangement between themselves affect the right of the sheriff to his lawful fees or the right to collect enough to pay all the costs and the portion coming to the parties entitled to one-twentieth of the proceeds; but they had a right to do what they pleased with nineteen-twentieths less the costs; and it would be very unnecessary to compel the defendant to pay the whole of the purchase money after the others had surrendered their right to it, and when nearly all of it would be immediately paid back to him.

It was not necessary that the answer should aver that the agreement with Adams was in writing, for the statute has not changed the common law mode of declaring, and a writing could be given in evidence in support of the averment sufficient to take the case out of the statute. If then the defendant can show a valid agreement with Adams that will silence his claim against the sheriff for any part of the purchase money, the defendant ought not to be compelled to pay the portion represented by Adams. But if the contract, when proved, will not operate as a release by Adams for any share of the purchase money, it will not avail the defendant in this action.

We think, then, that the court erred in striking out a part of the defendant's answer, and for the reasons already given the judgment ought not to have included all of the four-twentieths which belonged to the defendant.

The other judges concurring, the judgment will be reversed and the cause remanded.

Holtzclaw v. Duff.

**HOLTZCLAW *et al.*, Defendants in Error, v. DUFF *et al.*,
Plaintiffs in Error.**

1. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence.

Error to Hannibal Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Lamb & Lakenan, for plaintiffs in error.

I. From the plaintiffs' own testimony defendants were only shown to be carriers of persons and property on the Hannibal and St. Joseph Railroad. They carried upon no other thoroughfare. They were not in the habit of shipping their freight on board of steamboats or of storing it at Hannibal. Defendants were not common carriers. They were not responsible as common carriers for the loss in question. They transported the hemp safely to Hannibal. (See Story on Bail. § 546, 446; 4 Term R. 581.) The defendants had a right to exempt themselves from liability as common carriers. They did so by giving notice. (13 Barb. 353; Sto. on Bail. § 549; 2 Kent, Comm. 605; 2 Camp. 415; 3 B. & C. 606; 6 How. 382; 2 Comst. 204.)

Dryden, for defendants in error.

I. A carrier can not limit his common law liability by the publication of a notice such as is relied on in this case. (6 How. 382; Sto. on Bail. § 570, 571; see 2 Hill, 623; 19 Wend. 240; 19 Wend. 272.)

RICHARDSON, Judge, delivered the opinion of the court.

The defendants were the contractors for the construction of the Hannibal and St. Joseph Railroad, and used so much of the road as was finished in running cars for transporting materials for the work and in carrying passengers and freight

for compensation. They caused notices to be published and posted at the stations on the line of the road—which were seen by the plaintiffs before they made the shipments that led to this controversy—to the effect that they proposed, for the convenience of citizens along the road, to transport persons and the articles of merchandise therein named upon certain conditions, which should become a part of all contracts for transporting persons and property, to-wit: 1st, that they did not assume the position of common carriers, and would not be subject to any responsibility as such; 2d, that they would not be responsible for any loss or injury which might result from accidents to the trains, detention, exposure to the weather, or any other cause; 3d, that the owner must receive his goods on the arrival of the cars at the place of delivery; and, 4th, that as store-houses had not been provided at the stations on the road, they could not take care of property after its arrival at the place of destination, and therefore reserved the right, in case the owner should not be present to receive his property, to store it, subject to the charges for transportation, at the owner's risk and cost for drayage and storage. On the 1st and 2d September, 1856, the plaintiffs delivered to the defendants at the Palmyra dépôt two lots of hemp, in good order, which they agreed, in consideration of a reasonable reward to be paid by the plaintiffs, to carry safely to the Mississippi river (at Hannibal) and there to be safely delivered on board of a steamboat for the purpose of being carried to St. Louis. When the hemp arrived at Hannibal it was removed from the cars and deposited on the levee in front of the steamboat landing, and whilst lying there awaiting a boat, being insufficiently protected, was injured by rain. The defendants had no warehouse at Hannibal for storing freight, except a building fifteen by forty feet, which was sometimes used for that purpose; but a portion of it was occupied as a machine shop, in which a steam engine was in operation. It appeared however that there were warehouses in Hannibal, owned by different commission merchants, sufficient to have stored the

Holtzclaw v. Duff.

hemp, distant four or five hundred yards from the terminus of the road. The court instructed the jury that the defendants were common carriers; that they could not limit their common law liability as such by a general notice to the public, and that they were liable for any injury to the hemp from the time they received it until they delivered it on a steamboat to be carried to St. Louis.

It is not necessary for us, in the decision of this case, to determine the legal effect of the notice which the defendants gave the public, nor whether they were common carriers, for, whether they were such or not, the notice would not excuse them from loss occasioned by their negligence or want of ordinary care, and beyond that, in this case, they are not liable. Assuming, however, that they were common carriers, the fair construction of the contract is that they undertook to carry the hemp safely to the terminus of the railroad, and there to deliver it on board of a steamboat to be transported to St. Louis; and the contract subjected them to the liability of common carriers until the hemp reached the point where it left the road, and then to the liability of forwarders for storage and delivery to a steamboat. (Pierce Railroad Law, 451.) Both duties were embraced in one contract for hire, and, although there was no separate charge for taking care of the hemp after it reached Hannibal, and for shipping it to St. Louis, yet the freight, which the plaintiffs were bound to pay, covered the compensation for the whole services, for the storage and forwarding as well as for the carriage. The contract imposes distinct duties, for a failure in which the defendants were subjected to two separate liabilities in different degrees of responsibility; first, that of common carriers, and next, that of warehousemen and forwarding agents. (Sto. Bail. § 446.) As common carriers they were, to a certain extent, insurers of the hemp as long as it was *in transitu*, subject only to the exceptions which will excuse a delivery, arising either from the act of God or from the public enemies. But after the hemp reached the terminus of the road and was removed from the cars, a different and less

Holtzclaw v. Duff.

onerous obligation was assumed, and they became liable as warehousemen and forwarding agents, and as such were only bound to take reasonable care of the property, and were only answerable for losses occasioned by their fault or negligence. This principle has a familiar illustration in the leading case of *Garside v. Treat & Mersey Nav. Co.*, 4 Term R. 581. The defendants in that case, who were common carriers between Stour-point and Manchester, undertook to carry goods from the former place to the latter, and to forward them from thence to Stockport. When the goods arrived at Manchester there was no Stockport carrier there at the time by whom they could be sent on, and they were deposited in the defendant's warehouse to await an opportunity of being sent to the place of destination by the Stockport carrier, but before an opportunity occurred they were destroyed by an accidental fire. It was held that the carrier was not liable, because his obligation as carrier had ceased, and that of warehouseman had commenced before the loss.

It was the duty of the defendants to exercise ordinary care, skill and diligence in preserving the hemp after it was taken from the cars; and in determining what is reasonable care, the nature of the commodity, its liability to injury from exposure to rain, the kind of weather at the time it arrived, the usual mode of storing or piling on the levee, and the ordinary manner of protecting such property out of doors, are circumstances to be considered by the jury; for what would be deemed ordinary care in reference to lead, pig-iron, or other articles of commerce not easily injured by exposure, would be gross negligence in reference to flour, grain, hemp or other produce affected by dampness and requiring greater attention. When the plaintiffs delivered the hemp to the defendants, they had a right to expect that they would deal with it in good faith and take reasonable care of it, and they must answer for any loss the plaintiffs have sustained for the want of ordinary care on their part.

The other judges concurring, the judgment will be reversed and the cause remanded.

Hannibal, Ralls Co. and Paris Plank Road Co. v. Robinson.

**HANNIBAL, RALLS COUNTY AND PARIS PLANK ROAD COMPANY,
Appellant, v. ROBINSON, Respondent.**

1. Under the revised code of 1845, a justice of the peace could set aside a nonsuit only in case it was rendered on account of the absence of the plaintiff at the time appointed for trial; if a justice should render a judgment of nonsuit and dismiss a cause for the alleged reason that the plaintiff had not filed with him the instrument of writing on which the suit was founded, no motion to set aside such nonsuit would be necessary to entitle the plaintiff to an appeal.
2. The seventh section of the second article of the act regulating proceedings in justices' courts (R. C. 1845, p. 638) did not, in a suit to recover the balance alleged to be due on a subscription to the capital stock of a plank road company organized under the act of February 27, 1851, (Sess. Acts, 1851, p. 259,) require the filing of the original articles of association executed by defendant and others for the purpose of organizing the company.

Appeal from Ralls Circuit Court.

Porter & Harrison, for appellant.

I. No motion to set aside the dismissal was necessary. The clause of the statute requiring the filing with the justice of any paper on which the suit is founded before any process issues is merely directory. (6 Mo. 516.) By the by-laws the original articles of association had to be kept by the secretary for the use of the members.

W. E. Cooke and Vanswearingen, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff filed (July 14, 1854) an account against the defendant for the balance due on his subscription to the capital stock of the Plank Road Company. At the trial before the justice both parties appeared, and on the defendant's motion the cause was dismissed because the plaintiff had not filed the original articles of association on which the liability of the defendant arose. The plaintiff thereupon appealed to the circuit court. In that court the defendant moved to

Hannibal, Ralls Co. and Paris Plank Road Co. v. Robinson.

dismiss the appeal because the plaintiff had not applied to the justice to set aside the nonsuit, and because an appeal will not lie from a judgment of nonsuit before a justice unless a motion is first made to set it aside. The defendant also renewed the motion to dismiss the suit that had been made and sustained by the justice. Both motions were sustained. Pending these motions, the plaintiff filed the original articles of association purporting to be signed by the defendant and many other persons, from which it appears that the instrument was executed for the purpose of organizing a corporation for the construction of a plank road between designated points, pursuant to the provisions of an act of the general assembly entitled "An act to authorize the formation of associations to construct plank roads and macadamized roads," approved 27th February, 1851. (Sess. Acts, 1851, p. 259.) This paper shows the objects of the association, the respective sums agreed to be paid by the stockholders thereto, and in all particulars seems to conform to the requirements of the second section of the act. The plaintiff also filed the by-laws of the association, which require among other things that the secretary shall carefully keep and preserve all books and papers belonging to the company, subject at all times to the inspection of any stockholder.

The record presents only two questions, which are, *first*, was it necessary for the plaintiff to move to set the judgment of nonsuit aside before the appeal was taken; and, *second*, was it necessary that the original articles of association should be filed with the justice at the commencement of the suit.

In suits in justices' courts, if the plaintiff fail to appear in person or by agent, the justice is required to render judgment of nonsuit against him with costs, unless the action is founded on an instrument of writing purporting to have been executed by the other party and the demand is liquidated. So also judgments by default may be rendered against the defendant if he fail to appear, and such judgments of nonsuit and by default may be set aside by the parties for good cause

shown, provided application is made for that purpose within ten days after the rendition of the judgment. (R. C. 1845, p. 651, § 7, 8, 9 and 10.) And it has been often decided that an appeal can not be prosecuted from a judgment of nonsuit rendered because the plaintiff failed to appear, or by default, unless an application to set it aside is first made in due time to the justice and overruled. But a justice of the peace has no general power to set aside verdicts, and can only grant new trials in cases provided for by the statute; and as he can not set aside a judgment of nonsuit unless it was rendered on account of the absence of the plaintiff, it would be useless to require a plaintiff, nonsuited for any other reason, to ask the justice to set aside a judgment over which he has no control. The judgment in this case was not a nonsuit within the meaning of the ninth section of the act referred to, and therefore, as the justice had no power to set it aside, the plaintiff was not bound, as a preliminary to the right of appeal, to move the justice to set it aside.

The section of the statute which provides that "whenever any suit shall be founded on any instrument of writing purporting to have been executed by the defendant, such instrument shall be filed with the justice before any process shall be issued in the suit," does not apply to a case like this. The instrument on which the liability of the defendant arose was the organic act of the company, and by the by-laws of the corporation of which he was a member was required to be kept by the secretary subject to the inspection of the stockholders. It contains the names of all the stockholders; and if it be, as the defendant contends, that this paper must be filed in a suit against any delinquent and remain with the court or justice during the pendency of the litigation, then but one suit can be prosecuted at the same time, and that one might be so long in court that an action against other delinquent subscribers would be barred by limitation. Very often all the original subscriptions to the stock of a corporation are made in one large book, containing other matter of daily use to the company, and to require such a book to be

Mitchell v. Williams.

filed in a suit would not only cause great inconvenience to the business of a corporation, but would practically deny it the process of the law to enforce the collection of its demands. The subscribers to the stock may reside in different parts of the state, and if many of them refused to pay the calls on their stock, the life of the corporation might expire before every delinquent could be sued. The statute ought not to receive a construction which would work such public inconvenience, when a more liberal view will subserve all the purposes of justice, and injure no one. If the defence puts in issue the execution of the paper, it will be time enough to produce the original.

Judge Napton concurring, the judgment will be reversed and the cause remanded. Judge Scott not sitting.

MITCHELL, Respondent, WILLIAMS, Appellant.

1. An action on a guardian's bond must be brought in the name of the state.
2. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward.
3. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian.

Appeal from Jefferson Circuit Court.

Noell, for appellant.

I. When county courts make allowances to guardians, these adjudications are conclusive unless attacked and set aside in a proper proceeding on the ground of fraud in obtaining them. No fraud was shown or found in this case. The statute of limitations also is a bar to the present proceedings. The cause of action, if any, accrued more than five years previous to the commencement of this suit. The finding is defective on this point. (Jones v. Brinker, 20 Mo. 87; 20 Mo. 530.)

T. C. Johnson, for respondent.

I. The facts are admitted to be correctly found ; there was no motion of review as to them. (18 Mo. 201, 254; 17 Mo. 553.) The suit is not barred by the statute of limitations. It was in proof that the fraud was not discovered until six months before the bringing of the suit.

RICHARDSON, Judge, delivered the opinion of the court.

The petition states that the defendant was appointed in 1838 guardian of the person and property of the plaintiff, and executed a bond conditioned for the faithful discharge of his duty. It alleges that he did not faithfully perform the duties of his office, and proceeds to assign many breaches, which are chiefly that he fraudulently made false charges against the plaintiff, and fraudulently omitted to make proper charges against himself in his settlements with the county court. The defendant denied every allegation of fraud and insisted that his settlements were conclusive on the plaintiff. He also set up a settlement he had made with the plaintiff, and relied on the statute of limitations. The suit was commenced under the act of 1849, and the case being tried without a jury, the facts were found by the court, on which the judgment was rendered.

There is some doubt whether the action is on the bond, or whether it is a proceeding to set aside the allowances and settlements in the county court and to surcharge and falsify the defendant's accounts. If the suit is on the bond it can not be maintained, because it is not in the name of the state, (*Sickles v. McManus*, 26 Mo. 28,) and because in that form of action the settlements of the guardian are conclusive. (State, to use of *Tourville, v. Roland*, 23 Mo. 95.) But, treating it as of the nature of an equity proceeding to set aside the allowances and settlements in the county court on the ground that they were fraudulently procured, it would of course be necessary to establish by proof the charge of fraud in order to overcome the settlements which have the effect of

Hickman v. Kunkle.

judgments. (Jones v. Brinker, 20 Mo. 87.) The court finds that the settlements were not correct; that the defendant obtained allowances which he was not entitled to, and that he ought to be charged with items omitted in his settlements; but it is not found that the allowances or settlements were procured by fraud, and for that reason the judgment must be reversed.

The facts are not sufficiently set out in the record for us to determine whether the action is barred by limitation. It does not appear when the guardian made his final settlement, nor when the plaintiff became of full age. But it may be remarked that there is nothing in Mr. Pipkin's testimony to establish the starting point for the running of the statute of limitations, for it is not seen that he made any discovery of fraud which the accounts in the clerk's office would not have disclosed to the plaintiff if he had taken the pains to examine them.

The other judges concurring, the judgment will be reversed and the cause remanded.

HICKMAN *et al.*, Plaintiffs in Error, v. KUNKLE, Defendant in Error.

1. In suits in justices' courts, as well as in suits in the superior courts, the defendant, in order to impose upon the plaintiff the necessity of proving the execution of an instrument sued on, must deny its execution under oath.
2. A promissory note given by one partner in the name of the firm is binding, *prima facie*, upon all the partners; if the note be given for the individual debt of the partner executing the same, or for an indebtedness created in relation to a matter known to be foreign to the business of the partnership, the partnership is not bound. It devolves upon the partners, in order to escape liability, to show these facts.

Appeal from Hannibal Court of Common Pleas.

Porter and Harrison, for plaintiffs in error.

- I. *Prima facie* the note was binding on the partnership.

Hickman v. Kunkle.

The burden of showing a want of authority rests upon the defendant. (Story on Part. § 133.) The execution of the note by Webb in the name of the firm was admitted.

NAPTON, Judge, delivered the opinion of the court.

This action was originally before the recorder of Hannibal, who was acting as a justice of the peace, but it was subsequently tried in the Hannibal court of common pleas. The suit was upon a negotiable promissory note for seventy-one dollars and forty-two cents, executed, in the name of Webb & Kunkle, partners in a livery stable, to the plaintiffs, who dealt in stoves, tin-ware, &c. Upon the trial, the plaintiffs offered to read the note in evidence, but the defendant stated, *ore tenus*, that the note was executed by Webb on his own private account and without the knowledge or consent of defendant, and he objected to reading the note without proof that he (defendant) had assented to the execution of it, or without proof that it was given in a transaction embraced within the scope of the partnership business. No such proof being in the first instance proposed by the plaintiff, the note was excluded and the plaintiff took a nonsuit, and afterwards moved to set aside the same; upon overruling which the case is brought here.

Although our statute, which requires a defendant in the superior courts to deny the execution of an instrument sued on by answer or plea sworn to in order to impose upon the plaintiff the necessity of proving its execution, has never been expressly enacted in reference to proceedings before justices, yet, as early as 1826, the court held that a note or bond sued on and filed before a justice could be read in evidence without proof of its execution unless the defendant would declare, *ore tenus*, that it was not his deed, and would swear to the fact; (Kennerly v. Weed, 1 Mo. 673;) and such is believed to have been the practice ever since.

In relation to the principle or rule upon which the plaintiffs seem to have been nonsuited, the court of common pleas

Hickman v. Kunkle.

was also in error. *Prima facie*, a note given by a partner in the name of the firm binds all the partners. If the note be given for a preëxisting debt [of one partner], the partnership is not liable unless the creditor shows that it was expressly or impliedly sanctioned by the firm. The reason for this is, that the very nature of the transaction is such as to show *prima facie* a fraud in the creditor. He can not be ignorant that the debt is an individual one, and if he expects to hold the partnership responsible, he must show facts or circumstances to remove the imputation which the very character of the transaction throws upon him. Upon the same principle and for the same reason, where there is no preëxisting debt, but the creditor takes from an individual partner a note for an indebtedness created in relation to a matter totally foreign to the business of the partnership, the partnership is not bound; for if the transaction be outside of the usual course of the partnership business, that circumstance alone is sufficient to advise the creditor that the liability is an individual and not a partnership debt, or, at all events, to put him on inquiry. But in this class of cases, as the question whether a transaction is outside of the partnership business or not is necessarily a question of fact, and a question which the defendant partners can easily answer by proof, and upon which their knowledge is necessarily more complete than the information of others, in cases of doubt it devolves upon them to show that the debt was contracted in a transaction entirely foreign to their business. *Prima facie* the debt is a partnership debt, as the partnership name is signed; and, although it is signed by one partner in the name of the firm, yet this is a general power he has in relation to affairs properly connected with or growing out of the partnership business, and it will so be presumed to be until the contrary be shown. If, for instance, as in this case, an article of commerce is sold to a member of a partnership, who gives the partnership note therefor, unless the very nature of the trade necessarily indicates that it can have no reference

at all to the business of the partnership, it can not with any propriety be said that the creditor has constructive notice that he is dealing with the partner on his individual account, and the liability of the firm in all these cases depends altogether upon the fact of notice, express or implied.

This matter is clearly explained by Chancellor Kent in a few words: "All partnerships are more or less limited. There is none that embraces, at the same time, every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of the law will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. The conclusion is otherwise if the subject matter of the contract was consistent with the partnership business; and the defendant would be bound to show that the contract was out of the course of the partnership dealings." (3 Kent, C. § 43.) Whether the subject matter of the contract is consistent with the partnership business is a question of fact, and if it be doubtful, it lies upon the partners to show first how it is. The intendment of law is that the note was given in the regular course of dealing, until the contrary is shown by the defendant. (Doly v. Bates, 11 Johns. 544.)

It is impossible to draw the conclusion in this case, from the mere facts stated in the bill of exceptions, that the purchase for which the note sued on was given necessarily was outside of the business in which the defendant was engaged. A purchase of fifty or a hundred stoves, or a large stock of miscellaneous tin-ware, would no doubt very clearly be outside of the business of livery stable keeping, in which defendant was engaged; but a livery stable might need one or more stoves for heating the offices usually connected with such establishments, and tin-ware might be necessary or useful about the building, for aught that appears. The true character of the transaction is not explained, and it was the

McDonald v. Schneider.

business of the defendant to do so in the first instance, and not of the plaintiffs.

Judgment reversed and remanded; Judge Richardson concurring. Judge Scott absent.

MCDONALD, Plaintiff in Error, v. SCHNEIDER, Defendant in Error.

1. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town.
2. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town.
3. In order that a defendant may defeat a recovery in an action of ejectment by showing an outstanding title in a third person, such outstanding title so set up must be a present, subsisting and operative title, such an one as the owner thereof could recover on if he were asserting it in an action.
4. Possession of land is presumed to be in the true owner. Being presumed to be in the possession of the whole, another entering upon him, whether under color of title or not, can acquire title as against him, under the statute of limitations, only to such portion as is actually occupied by him for twenty years adversely to the true owner; he is confined to his actual adverse possession, and the burden is on him to show such actual adverse possession and its extent.

Error to St. Charles Circuit Court.

This was an action of ejectment to recover a portion of lot numbered 24, in block 8, in St. Charles common. The plaintiff claimed, under the town of St. Charles, a leasehold interest in the premises in controversy for 999 years. In support of his title—after showing that the land sought to be recovered was embraced within the United States survey, approved in 1854, of the outboundary lines of the town of St. Charles, including the common confirmed to said town by the act of Congress of June 13, 1812—adduced in evidence, against the objection of defendant, a lease for 999 years, dated June 18, 1831, to one Wardlaw. This deed of lease is executed in the name of the trustees of the town of St.

McDonald v. Schneider.

Charles, and is signed by the clerk of the board of trustees, and has the corporate seal attached by him. It seems to have been first issued in favor of one James B. Bradley, whose name appears to have been afterwards obliterated, and the name of Wardlaw to have been substituted under an order of the board of trustees to that effect. On the 19th of September, 1834, said Wardlaw assigned said lease to Pleasant Gordon, who assigned the same to one Orrick, who made an assignment to the plaintiff. On the 22d of March, 1839, the board of trustees, by a deed of lease executed in the same manner as the first, again leased said lot to plaintiff. Plaintiff and those under whom he claims have paid the rent reserved.

The defendant claims title in right of his wife to the premises in controversy as being a portion of the north-east fractional quarter of section four, township 46 north, range 4 east. This fractional quarter section overlaps in part the south-west corner of the common of St. Charles. It was entered in the office of the register April 30, 1832. The patent is dated September 2, 1835. The evidence showed that plaintiff and those under whom he claims had been in possession of lot No. 24 from the date of the lease to Wardlaw, and that defendant had been in possession of fractional quarter section four from about the time of the entry thereof; but the testimony with respect to the actual occupancy of the overlapping portions of the two tracts was conflicting. The testimony showed that Bradley, soon after the date of the deed of June 18, 1831, left St. Charles, and that he never took possession of the said lot No. 24.

Numerous instructions were given and refused; the following embrace those referred to in the opinion of the court, which were given at the instance of the defendant: "2. The jury are also instructed that if they believe from the evidence in the cause that the lease aforesaid [that of June 18, 1831,] was executed and delivered to the said James B. Bradley by the board of trustees of the town of St. Charles, the legal effect of said lease was to divest, for the period of

McDonald v. Schneider.

time mentioned in said lease, whatever title the town of St. Charles had in and to the premises therein mentioned, and that the title thus divested could not, during the term of said lease, be revested in said corporation, except by a reconveyance in writing by said Bradley, or his assignee, to said corporation, or by a judicial decree of some court of competent jurisdiction; and there is no legal evidence either of such reconveyance or decree. 3. If the jury find from the evidence in the cause that Augusta Boschet, alias Lively, on the 30th day of April, 1832, entered at the land office of the United States, at St. Louis, the north-east fractional quarter of section 4, township 46 north, range 4 east; that the defendant afterwards, in the year 1832, married said Augusta, and in virtue of said entry at the land office aforesaid, entered in said year upon a part of the said fractional quarter section, claiming title to the whole, erected a dwelling-house thereon, and cleared, put under fence and cultivated a part thereof, and openly resided upon the same, and openly cultivated parts thereof continuously for the period of twenty years next before the institution of this suit; and the jury shall also find from the evidence that the land in controversy is included within the limits of said fractional quarter section, they will render their verdict for the defendant for such parts of said quarter section now in dispute as the said defendant held and occupied as aforesaid, unless they shall also find from the evidence that the land in controversy was, within the said twenty years, in the actual open adverse possession of another. 4. The jury are further instructed that if they find from the evidence in the cause that the lease bearing date June 18, 1831, read in evidence, was by the board of trustees of the town of St. Charles executed and delivered to said James B. Bradley by the said board or their agent; and afterwards, during the continuance of the term specified in said lease, the said board of trustees ordered their clerk to erase the name of said Bradley from said lease and insert the name of Hugh H. Wardlaw instead, and their clerk obeyed said order, and made the erasure in the

McDonald v. Schneider.

absence of said Bradley, and without his knowledge; and the said board of trustees caused the said lease, after the said erasure, to be delivered to the said Wardlaw, such alteration and delivery was an illegal and unauthorized spoliation of the lease, which did not destroy or affect the right of Bradley to the lease as a muniment of his title to the premises conveyed by it, nor vest in said Wardlaw any title to said premises, nor enable him to assign the same to Gordon; and in case the jury find the fact of erasure as specified in this instruction, they will render a verdict for the defendant. 5. The defendant asks the court to instruct the jury that upon the case made by the plaintiff, he can not recover in this action."

The plaintiff took a nonsuit with leave, &c.

Wells and Krekel, for plaintiff in error.

I. The trustees had power to lease the commons. (R. C. 1825, p. 766; 2 Terr. Laws, 296, 410; Sess. Acts, 1837, p. 306.) Misnomer does not invalidate. (Grant on Corp. 65; Angell & Ames on Corp. p. 78, 194, 584; 2 Kent Com. 292; 19 Mo. 613.) The corporation has recognized the validity of the lease by renewing it and collecting rents.

II. Plaintiff's entering on part of lot 24 in 1833 stopped the statute from running. (5 Litt. 89, 90; 4 Barr, 254.) The defendant is limited to the possession he had twenty years prior to the bringing of this suit. (5 Dana, 65; 1 Hill, 135; 2 Harr. & Jo. 380; 10 Mo. 769; 20 Penn. 32; 2 Bibb, 508; Angell on Limitation, 432, 443.) The defendant must show the extent and boundary of his possession.

III. Bradley could not recover on the title set up as outstanding in him. It was barred by the statute of limitations. It is not a living subsisting title. (1 Mary. 234; 2 Har. & Jo. 125; 1 Swan, 519; 3 Johns. 386; 18 Mo. 522; 6 Pet. 302; 9 Yerg. 325; 4 Johns. 202.) The instructions given for the defendant were erroneous.

U. Wright, for defendant in error.

I. Plaintiff's case failed upon his own showing. The proof

McDonald v. Schneider.

was that the title was in another. (R. C. 806; 19 Mo. 132; 1 Parsons on Contr. 118; Angell & Ames on Corp. 293; 12 Wheat. 64; 6 Peters, 452; Comb's case, 9 Co. 76, b.; 11 Mo. 209; 4 Bac. Abr. 140; 16 Mo. 42; 2 Cush. 337; Story on Agency, 147; 1 Amer. Lea. Cas. 597.)

SCOTT, Judge, delivered the opinion of the court.

We do not see the force of the objections to the deed of lease made by the trustees of the town of St. Charles to Wardlaw. It is under the seal of the corporation. The common seal is proved. It is also shown that it was affixed by the clerk of the board of trustees, who was authorized thereunto by ordinance. The attesting clause is nearly in the language required by law. (Angell & Ames, § 225.) The town of St. Charles was incorporated by an order of the county court of the county of St. Charles in 1830, in pursuance to the provisions of the act of the legislature approved January 26th, 1825. Under this act, and the act of December 22d, 1824, concerning commons, it was supposed that the town had authority to lease her commons, and she did actually lease portions of them. Being in the exercise of this right, when the act of 28th December, 1832, respecting the commons of St. Charles, and the act of 27th January, 1837, incorporating the town, were passed, the two first sections of the former and the 9th section of the latter of these acts must be regarded as a recognition of the validity of the powers previously exercised in relation to the commons. But where is the utility of such an objection, as the town recognizes the validity of the leases she has granted? At most, it could only render a change in the style of the suit necessary. St. Charles could sue in her own name. Those going in under void leases would be regarded as tenants at will. Their occupation or possession would enure to the benefit of the town on a question as to the propriety of the application of the statute of limitations. (Murray v. Armstrong, 11 Mo. 209.)

McDonald v. Schneider.

We are told that as early as the time of Lord Coke an attempt by a corporation to set aside a grant for a misnomer was severely censured. The act under which St. Charles was incorporated required that the town incorporated should be a body politic and corporate by the name and style of "The inhabitants of the town of ———," naming the town to which the charter was granted. The lease is in the name of the trustees of the town of St. Charles, a misnomer which the officer very naturally made; as it will be seen, from the act in relation to towns and the several acts before referred to, that, when any thing is to be done, the statute requires that the trustees should do it. The rule with regard to the misnomer of individuals does not apply to corporations. The trustees were the recognized agents of the inhabitants. To them was confided all the police power of the body politic. When they acted as such, it must have been for the inhabitants of the town. The transposition or omission of some of the words of the name of a corporation or the interpolation of others does not necessarily make a difference in their sense. (10 N. H. 123; 32 Eng. Law & Eq. 589; Angell & Ames on Corp. § 99.)

The second and two last instructions given for the defendant were erroneous, under the facts of the case. The deed to Bradley was upwards of twenty years old. There had been no possession under it for more than twenty years by Bradley or those claiming under him. It is a well established principle that an outstanding title in a third person, set up as a bar to a recovery in an action of ejectment, must be such a one as the owner of that title himself could recover on if he were asserting it in an action. It must be a present, subsisting and operative title. Now it is obvious that the title of Bradley, set up in this action, was not such a one. *Prima facie*, he could not have maintained a suit upon it. Why then should a stranger be permitted to use it as a defence in an action of ejectment? There were no circumstances in evidence which relieved it from the objections with which it was encountered. (Jackson v. Hudson, 3 John.

McDonald v. Schneider.

375 ; Greenleaf's Lessee v. Birth, 6 Pet. 302 ; Peck v. Carmichael, 9 Yerg. 325.) Moreover, there were facts from which a jury might have found a surrender or reconveyance of the demised premises. The fact that the deed of Bradley was in the hands of the grantor, his long continued absence and silence, the little value of the lease at the time, were circumstances of sufficient weight to have warranted such a verdict. Deeds may be presumed from length of time alone, nothing counteracting such a presumption. (1 Cow. & H. Notes, p. 355.)

Although it is a rule that he who is in possession of a part of a tract of land, having title thereto, is adjudged by the law to be in the possession of the whole of it ; and, although it is a rule that where possession is mixed, or where two persons possess adjoining tracts and their possession conflicts or interferes the one with the other, the legal possession is adjudged to be in him who has the better title—for, as both can not be seized, the possession follows the title—yet if he who has the inferior title enters upon the interference and actually occupies it adversely to him who has the better title for a sufficient length of time, he will acquire a title against the true owner by limitation as to the portion actually occupied, although the true owner may be in the actual possession of that portion of his tract which is not covered by the interference. (Barr v. Gratz, 4 Wheat. 213 ; Hall v. Powell, 4 Serg. & R. 456 ; Angell on Limitations, 432, 442 ; McGowan v. Crooks, 5 Dana, 65 ; Burns v. Smith, 2 Serg. & R. 436.) Had the case of *Altemus v. Long*, 4 Barr, 254, intended to overturn all the previous cases on the subject, they would certainly have been referred to. The case in Barr seems to turn on the effect of an entry at common law by the true owner on one not having a title. So the rule that possession of part is possession of the whole, is only applicable where there is no actual adverse occupancy.

If the defendant was in the actual adverse occupancy of any portion of the interference for a length of time sufficient to bar the plaintiff's action, he can not now be evicted by

Griffith v. Schwenderman.

him. But in such case he can only defend for the portion which he shows he has actually occupied for twenty years. The rule that possession of part, claiming the whole, under a color of title, is possession of the whole, can not avail him, as the plaintiff, having the legal title to the whole, is deemed to be in possession of the whole, and the defendant can only prescribe for that part which he shows to have been actually occupied for twenty years adversely to the plaintiff. The burden is on him and he is confined to his actual adverse possession, which must have been enjoyed for a time sufficient to create a bar of the plaintiff's right. The plaintiff's claim consists of a portion of the commons of St. Charles, which were confirmed by the act of 13th June, 1812. The defendant's title is a subsequent entry with the United States register and receiver and a patent thereon. The confirmation being the elder title, its superiority is admitted by the defendant.

The other judges concurring, the judgment will be reversed and the cause remanded.

GRIFFITH, Respondent, v. SCHWENDERMANN, Appellant.

1. Leases to infants are not absolutely void; they are only voidable.
2. Actual possession of part of a tract of land under claim and color of title to the whole is constructive possession of the whole as against all persons not having title; as against such person in possession of part, the constructive possession of the residue would lie in the true owner.
3. Possession of a parcel that has been occupied for twenty years can not be connected with the possession for a shorter period of another tract so as to bring the latter within the operation of the statute of limitations.

Appeal from St. Charles Circuit Court.

This is an action of ejectment to recover possession of lot No. 28, in block No. 8, in St. Charles common. Plaintiff is an infant. She claims title under a lease made to herself on the 23d of October, 1856, by the city of St. Charles. This

Griffith v. Schwenderman.

lease was made upon the surrender by plaintiff of a lease made by the trustees of the town of St. Charles on the 18th of June, 1831, to one Asa Griffith. The defendant claimed title by virtue of an entry, in the year 1836, in the United States land office at St. Louis, of the east one-half of the south-east quarter of section No. 34, in township 47, range 4. The defendant relied on the statute of limitations. The court ruled substantially that actual possession of part of the tract entered by defendant's husband in 1836 did not amount to constructive possession of the whole as against plaintiff.

U. Wright, for appellant.

I. The court instructed the jury erroneously. (See 4 Bibb, 100; 5 Litt. 211; 4 Monr. 44; 2 Dana, 127; 4 Dana, 282; 7 Dana, 434; 2 B. Monr. 379, 430; 11 B. Monr. 98; 12 B. Monr. 195; 2 Har. & Jo. 87; 10 Pet. 412; 11 Pet. 41; Angell on Lim. 428, 429; 2 Marsh. 19; 3 id. 545; 9 B. Monr. 83.) The paper purporting to be a lease from the trustees, dated June, 1831, ought not to have been received in evidence. Plaintiff's right accrued, if at all, in 1856. (2 Smith's Lea. Cas. 539; 4 Bac. Abr. 217.) It was never executed by the corporation. It purports to be executed by the trustees, but is not signed by them, nor by any one legally authorized to sign. (R. C. p. 806; 19 Mo. 132; 1 Pars. on Contr. 118; Angell & Ames on Corp. 293; 12 Wheat. 64; Comb's case, 9 Co. 76, *b.*; 11 Mo. 209; 4 Bac. Abr. 140; 16 Mo. 42; 2 Cush. 337; Sto. on Agency, 147; 1 Amer. Lea. Cas. 577.) The assignment on its back was improperly read. The proof of its execution was defective. The damages should not have been computed further back than the demise laid in the petition.

Krekel and *Wells*, for respondent, cited 9 Humph. 714; 1 Gratt. 225; 12 N. H. 9; 2 S. & R. 439; 4 id. 465; 3 Ired. 587; 7 id. 175; 20 Mo. 769; 5 Dana, 65; 1 Hill, 135; 2 Har. & Jo. 280; 20 Penn. 32.

SCOTT, Judge, delivered the opinion of the court.

The lease made by the city of St. Charles to the plaintiff on the 23d day of October, 1856, was at least binding on the city. It was signed, sealed and delivered, and passed title to the plaintiff. Leases to infants are not absolutely void; they are but voidable, and it is not for third persons to set up the defence of infancy. A deed might be in such terms as would induce a court to pronounce it void as to an infant. But leases to infants are, like all other contracts, void at their election. (Taylor's Landlord & Tenant, 58.)

The damages recovered having been remitted, it will not be necessary to consider the question arising on the lease made to the ancestor of the plaintiff on the 18th June, 1831, as the lease subsequently made to the plaintiff in 1836 enabled her to maintain this action, the prior deed being only of avail in estimating the damages.

The plaintiff claims under a lease made by the city of St. Charles of a lot of her commons which were confirmed to her by the act of Congress of the 13th June, 1812. The defendant claims under an entry with the register and receiver of the United States long subsequent. It is not controverted but that the plaintiff had the better legal title. The defendant relies on the statute of limitations, and contends that, having been in the actual possession [of part] with a color of title to the whole, she is deemed possessed of the whole, and, twenty years having elapsed since her entry and her possession being adverse, the plaintiff can not maintain this action against her. The rule of law with which the defendant seeks to protect herself is only applicable to those disturbing her who have no title. Her title failing as regards the plaintiff, she can have no constructive possession as against her. It may be conceded that the plaintiff has no other possession than that legal constructive possession which in law always follows and accompanies the legal title; that she has had no actual possession. Yet the defendant having

Bradley v. Creath.

no title as against the plaintiff, her constructive possession, available against an intruder, can not prevail against the legal constructive possession of the plaintiff. Under such circumstances the defendant can affect the plaintiff's possession only so far as there has been an actual adverse occupancy by her for twenty years—an adverse exclusive possession.

She can not connect a parcel that has been occupied for twenty years with a parcel that has been occupied for less time and protect them both by the statute. The authorities for this are abundant. (Burns v. Swift, 2 Serg. & R. 436; Angell on Limitations, 432; Bailey v. Carleton, 12 N. H. 13; Stewart v. Harris, 9 Humph. 714; Smith v. Ingram, 7 Ired. 175.)

The judgment will be reversed and a judgment entered here remitting the damages. Judgment giving the value of the monthly rents will be given from this time; plaintiff to pay costs of this court.

The other judges concur.

BRADLEY, Defendant in Error, v. CREATH, Plaintiff in Error.

1. The supreme court will not review instructions unless they are excepted to at the time they are given or refused.

Error to Marion Circuit Court.

T. C. Reynolds and Pratt & McCabe, for plaintiff in error.
Dryden, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

The only error complained of in this case is, that the court refused to give an instruction asked by the plaintiff, and though it was made the ground of a motion for a new trial it does not appear that an exception was taken at the time.

Collins v. Parker.—Field v. Barr.

It is the practice of this court not to review instructions unless they were excepted to at the time they were given or refused. (Powers v. Allen, 14 Mo. 367.)

The other judges concurring, the judgment will be affirmed.

COLLINS, Defendant in Error, v. PARKER, Plaintiff in Error.

1. Case affirmed.

Error to Hannibal Court of Common Pleas.

Porter & Harrison, for plaintiff in error.

Lamb & Lakenan, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

The only question involved in this cause is one of fact—whether Richards, in sending the note to Indiana for collection, was acting as the agent for the plaintiff or defendant. The jury, under suitable instructions, having found a verdict for the plaintiff, we see no reason to disturb it. The instructions asked by the defendant and refused were substantially embraced in those given by the court.

The other judges concurring, the judgment will be affirmed.

FIELD, Defendant in Error, v. BARR, Plaintiff in Error.

1. Allegations of value in a petition are not admitted by a failure on the part of the defendant to deny them in an answer, or by a default; they are not material traversable allegations.

Error to St. Louis Court of Common Pleas.

The following is the petition in this case: "Plaintiff states that defendant owes him three hundred and twenty-

Field v. Barr.

five dollars on account of thirteen gravel train or construction cars left by plaintiff with defendant, in May, 1854, for safe keeping. Plaintiff states afterwards defendant sold said cars and received the proceeds, to-wit, the amount above stated, which he has not accounted for, although demanded; that the same were worth said sum; and therefore he asks judgment."

Judgment by default was rendered against the defendant. The cause coming up for an inquiry of damages, the court instructed the jury that "the defendant having failed to answer the plaintiff's petition, the plaintiff is entitled to a verdict for the amount of the proceeds of the cars as stated in the petition, without any other proof, and also interest on that amount from the commencement of this suit."

N. Holmes, for plaintiff in error.

I. The court instructed the jury erroneously. (Robinson v. Lawson, 26 Mo. 69; Wood v. Steamboat Fleetwood, 19 Mo. 530; Arnold v. Palmer, 23 Mo. 411; 18 Mo. 396; 11 Mo. 10.)

Shreve, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The instruction given in this case was erroneous. The defendant did not admit the value of the railroad cars, or the amount of money received from their sale. These allegations of value are not what are termed traversable, so as to conclude the opposite party if not answered. It was so held in the case of Wood v. Steamboat Fleetwood, 19 Mo. 531, and in a case where there was an answer and no denial of the allegation therein. *A fortiori*, it must be so where a default is taken for want of an answer.

Judgment reversed and cause remanded; the other judges concur.

Chick v. Parker.—State v. Warne.

CHICK, Plaintiff in Error, v. PARKER, Defendant in Error.

1. In cases tried by a court without a jury under the practice act of 1849, the court should find the facts.

Error to St. Louis Land Court.

E. Bates, for plaintiff in error.

Bárrett, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

This suit was commenced under the practice act of 1849 and was tried by the court without a jury. The record shows that the case was tried and judgment given without finding the facts, and for this omission the judgment must be reversed and the cause remanded. (*Ragan v. McCoy*, 26 Mo. 166.) The other judges concur.



THE STATE, Respondent, v. WARNE, Appellant.

1. The fifth section of the seventh article of the act concerning practice in criminal cases (R. C. 1855, p. 1196) is not applicable to prosecutions for assault and battery commenced before justices of the peace; the jury, in the case of a conviction, must assess the fine to be paid. (See R. C. 1855, p. 979, § 11.)

Appeal from St. Louis Criminal Court.

This was a prosecution for assault and battery. The cause was taken by appeal to the St. Louis criminal court. The jury in the latter court returned the following verdict: "We, the jury, in the case of *The State v. Thomas S. Warne*, find the defendant guilty of assault and battery, and can not agree as to the penalty."

The court assessed the fine at one hundred dollars.

J. C. Jones, for appellant.

Mauro, (circuit attorney,) for the State.

Manny v. Frasier's Adm'r.

NAPTON, Judge, delivered the opinion of the court.

The fifth section of the seventh article concerning practice in criminal cases does not extend to trials for assault and battery before a justice. The 11th section of the law specially applicable to this subject declares that all trials under it shall be by a jury, &c., who shall assess the fine, &c. (R. C. 1855, p. 979.) The court had no authority therefore to assess the fine in this case, and the judgment must be reversed. The instructions given in the case were correct. We pass by the oral remarks of the court in relation to one of the witnesses without comment, as it is not likely that they will recur upon another trial.

Judgment reversed and cause remanded. The other judges concur.

MANNY, *et al.*, Respondents, v. FRASIER'S ADMINISTRATOR,
Appellant.

1. A. and B. as partners owed a debt to C.; A. sold out his interest to D., who agreed with A. and B. to assume and pay the debt due C. *Held*, that C. could not maintain an action, in his own name, against D., on his said promise to recover the said debt.

Appeal from Ralls Circuit Court.

The plaintiffs in their petition allege substantially that the partnership firm of Bell & Sticknell was indebted to them on two promissory notes; that Bell sold out his interest in the partnership to Frasier; that Frasier on coming into the firm agreed with Bell & Sticknell to assume and pay certain debts of the firm, among others the notes due plaintiffs. Plaintiffs seek to recover the amount of said notes of the said Frasier's administrator.

Allen, for appellant.

I. If defendant is liable at all, it is to Bell & Sticknell, and not to the plaintiffs. There is no privity of contract

Armstrong v. Johnson.

between plaintiffs and defendant. (Story on Contr. 549; 1 Strange, 592; 4 Seld. 207; 15 Georg. 321; 3 B. Mon. 356.)

Scott, Judge, delivered the opinion of the court.

This is not like the case stated in the books where A. owes B. and B. owes C. \$100, and the three meet, and it is agreed between them that A. shall pay C. \$100. B.'s debt is extinguished and C. may recover that sum against A. (Black v. Paul, 10 Mo. 104.) Nor does it fall within the rule that if one person make a promise to another for the benefit of a third, the latter may maintain an action upon it (Chitty, 5)—a doctrine which has been recognized by this court in the cases of the Bank of Missouri v. Benoist & Hackney, 10 Mo. 519, and Robbins v. Agnes, id. 538. In the case before us there was a debt already existing between the plaintiffs and Bell & Sticknell, and the defendant assumes or agrees with Bell & Sticknell to pay the debt they owe to the plaintiffs. This is not like a promise of A. to pay B. for the benefit of C. There is no privity of contract between the defendant's intestate and the plaintiffs. It is similar to all the undertakings of one partner to pay the debts of the firm. No instance has been found in which a creditor of the firm has been permitted to sue on such an undertaking in his own name. (6 Watts, 182, 349.)

Judgment reversed; the other judges concur.

ARMSTRONG, Respondent, v. JOHNSON *et al.*, Appellants.

1. A suit on a promissory note by an assignee against the maker is triable at the first term, although the assignment is denied.

Appeal from Shelby Circuit Court.

Pratt and McCabe, for appellants.

Dryden, for respondent.

Herndon v. Herndon's Adm'rs.

NAPTON, Judge, delivered the opinion of the court.

There is no point of law saved in this case, except the overruling by the court of the defendant's motion for a continuance. The only ground in this motion was, that the suit was not triable at the first term, it being an action upon a note by the assignee against the makers and the assignment being denied. The judgment is affirmed with ten per cent. damages. The other judges concur.



HERNDON *et al.*, Plaintiffs in Error, v. HERNDON'S ADMINISTRATORS, Defendants in Error.

1. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow.

Error to Monroe Circuit Court.

The facts sufficiently appear in the opinion of the court.

Dryden and McVagh & Brace, for plaintiffs in error.

- I. The language of the dower act does not embrace the increase of a female slave after it comes to the husband. (3 Mo. 98.)

Howell, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is, whether under our dower law, (R. C. 1845, 430, § 3,) on the death of the husband without children, the increase of the slaves that come to the husband by the wife, remaining undisposed of at his death, go with the mother to the widow. This question was determined affirmatively by this court in the case of Cotton and

Stavely v. Kunkel.

Cotton's administrator at the January term, 1851 ; though, from some cause not now known, no opinion is to be found on file in the case. Our conclusion in the present case is the same. It is conceded that a strict and literal interpretation of this section of our law might exclude the increase ; for, as the husband is the absolute owner of the mother, the increase may be said to become his by reason of such ownership and not by virtue of the marriage. But indirectly they do come to him by virtue of the marriage, and the construction which gives to the widow the increase along with the mother is more accordant with the general policy of our law.

In this state, and indeed in most of the slave states, the issue of a female slave follows the condition of the mother ; and if during a tenancy for life the mother has children, they go with the mother to the person who has the remainder or reversion. A difference has thus been adopted between slaves and other property, founded upon motives of humanity and having regard to the moral as well as legal relations between master and slave. This distinction is so well understood, not merely by the profession, but so generally recognized and acted on by the community at large, that it is no violent presumption to suppose that the legislature intended, by the general terms which they have used in the dower law, to embrace the increase of slaves, as well as the slaves themselves, as property coming by the marriage.

The other judges concurring, the judgment is affirmed.

STAVELEY, Respondent, v. KUNKEL, Appellant.

1. An appeal to the supreme court must be made, under the revised code of 1855, during the term at which the judgment or decision appealed from is given ; it can not be made before the clerk in vacation. (R. C. 1855, p. 1287, sec. 11.)

Hargadine v. Pulte.

Appeal from Hannibal Court of Common Pleas.

Allen, for respondent.

Scott, Judge, delivered the opinion of the court.

The revised statutes of 1855 require an appeal to be made during the term at which the judgment or decision appealed from was given. This provision is to be found in the 11th section of the 13th article of the act to regulate practice in courts of justice. This appeal having been made before the clerk in vacation must therefore be dismissed.

Appeal dismissed. The other judges concur.

*HARGADINE, Plaintiff in Error, v. PULTE, Defendant in Error.*

1. A. died in 1844, devising his property as follows: "I hereby grant, give and bequeath unto my beloved wife, B., all and singular my property and estate, real, personal and mixed, in law and equity, including as well all I possess at present as such as I may acquire hereafter, to have and to hold the same unto her, my said wife, as her own and exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not, forever." The said A. left him surviving his said wife and four children. *Held*, that there was an intestacy as to the children of A., they not being named or provided for within the meaning of the 30th section of the act concerning wills. (R. C. 1835, p. 620.)

Error to St. Louis Land Court.

This was an action of ejectment to recover possession of a certain lot in the city of St. Louis. Plaintiff claims title through the widow of one Philip A. Pulte, who died seized of the said premises in the year 1844. The said Pulte made a will devising his property as follows: "I hereby grant, give and bequeath unto my beloved wife, Philippine Bernadine, all and singular my property and estate, real, personal and mixed, including as well all I possess at present as such as

Pratte v. Coffman's Exec'r.

I may acquire hereafter ; to have and to hold the same unto her, my said wife, as her own and exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not, forever." The defendant is a son of said P. A. Pulte, and holds possession of said premises for himself and the other children of said Pulte.

N. Holmes, for plaintiff in error.

I. The case of *Hockensmith v. Slusher*, 26 Mo. 237, settles the principles of this case. The intention to cut off the children is clearly indicated in the will.

C. Gibson, for defendant in error.

I. It can not be determined from the will itself whether or not the testator ever had a child. (See *Bradley v. Bradley*, 24 Mo. 316.)

NAPTON, Judge, delivered the opinion of the court.

This case falls within the principles and reasoning of the case of *Bradley v. Bradley*, 24 Mo. 316. Where a testator declares his wife to be his *sole heir*, the implication of an exclusion of his children is just as strong as where the estate is given to the wife "as her own and exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not." In truth, the multiplication of words in this last case rather weakens the force of the first clause, as the phrase "relatives" might be very naturally understood as not embracing one's *children*.

The other judges concurring, the judgment is affirmed.



PRATTE *et al.*, Appellants, v. COFFMAN'S EXECUTOR, Respondent.

1. A devise of land will carry with it a crop growing thereon at the death of the testator unless the testator otherwise directs.
2. A testator devised a plantation to three grand-children ; he then proceeded to direct the sale by the executor of certain real estate, "also all the perish-

Pratte v. Coffman's Exec'r.

able part of my estate, such as horses, mules, cattle of every description, plantation tools, household and kitchen furniture, crops on hand, and all other personal property not herein otherwise disposed of," &c. *Held*, that a crop growing on said plantation at the death of the testator passed to the devisees and not to the executor.

Appeal from Ste. Genevieve Circuit Court.

This was a cause submitted to the circuit court upon an agreed statement of facts. Joseph Coffman died leaving a last will and testament, by which, among many other devises, he devised a plantation known as the Bellefontaine tract to his three grand-children, Mary, Joseph and Bernard Pratte. At the time of the testator's death there was a crop of wheat growing on said plantation. By the ninth clause of the will it was provided as follows: "It is my will and desire that my executor hereinafter named shall sell the interest I own in the mill property of Hormie & Coffman, with the lands adjoining, and also the interest I bought under two sheriff's sales in certain land sold as the property of Thomas Madden, jr., son of Richard Madden, deceased; also all the perishable part of my estate, such as horses, mules, cattle of every description, plantation tools, household and kitchen furniture, crops on hand, and all other personal property not herein otherwise disposed of; to receive and collect the proceeds of said sales, together with all other sums of money which may be due me by bond, account or otherwise at the date of my decease; and all sums of money on hand; and, so soon thereafter as sufficient sums shall be received for that purpose, that he pay the specific legacies above given, with interest from the date of my decease." The executor appropriated and converted to his own use the said crop of wheat. The court gave judgment upon the agreed case for defendant.

Noell, for appellants.

I. By "crops on hand" is not meant growing crops. The growing crop passed to the devisees. (1 Williams on Ex'rs, 600; McIlvaine v. Harris, 20 Mo. 457.)

Pratte v. Coffman's Exec'r.

Scott & Watkins and *B. A. Hill*, for respondent.

I. The growing crop of wheat passed to the executor. The devise did not carry with it the standing crops growing upon the premises at the time of the testator's death. (See *West v. Moore*, 8 East, 339; *Cox v. Godsalve*, 6 East, 602; *Seabrook v. Williams*, 3 McCord, 371; *Penhallow v. Dwight*, 7 Mass. 34; *Taylor v. Bond*, 1 Busbee, N. C. 5; 5 Barn. & Ad. 105; *Roberts v. Barker*, 1 Crom. & Mees. 809; *Evans v. Roberts*, 5 B. & Cr. 829; 1 Williams on Ex'rs. 456.)

SCOTT, Judge, delivered the opinion of the court.

On general principles a devise of land carries with it the crops growing upon it. If the devisee is entitled to the crop as against the heir, it is because it is considered as a part of the realty and goes along with it. In the case of *McIlvaine v. Harris*, 20 Mo. 457, it was held that a growing crop of wheat was an interest in land. As between the executor and heir, growing crops may be personalty; but, as between heir or executor and devisee, they are deemed a part of the realty. It is clear, then, that by the devise the growing crop passed along with the land and must remain with it, unless the testator has otherwise directed, which it is admitted that it was competent to him to do. The clause in the will on which the defendant relies directs the executor "to sell all the perishable part of the estate, such as horses, mules, cattle of every description, plantation tools, household and kitchen furniture, crops on hand, and all other personal property not herein otherwise disposed of." The tract of land devised to the plaintiffs was a considerable distance from the homestead of the testator, where he had a large estate. It is clear that all the words of the will may be satisfied without taking the crop growing on the land devised. There may at the same time belong to a person a crop on hand and a growing crop. The words "other personal property" show what the testator had in his mind. By employing the terms "other personal property" he conveyed the idea that

all the property before enumerated was personal property. He directs, too, that all his perishable property be sold, and enumerates it in part, in which enumeration are "crops on hand." It is not usual to denominate growing crops as perishable property. But "crops on hand," or which have been gathered, may be so termed with the strictest propriety of language. If the testator regarded the crop growing on the land devised as personal property, which he must have done if it is embraced in the words of the clause above cited, then he did not intend to give it to the executor, because he willed to him only the personal property not herein otherwise disposed of. If he regarded it as realty it did not pass, for he only gives the executor the personal property. The case mostly relied on by the defendant is that of *West v. Moore*, 8 East, 341. There the testator devised estates in fee to one, and to his executor all his money, stock upon his farm, with the implements of husbandry, and all other his personal estates of what nature or kind soever. It was held that the crop growing upon the estates passed to the executor. This case only shows how differently the words "stock on a farm" are understood in England and among us. In construing a Missouri will, would it ever have entered into the head of man to conceive, unless he had accidentally read the case referred to, that by the words "stock on a farm" the testator intended to pass a growing crop? The reasoning of Lord Ellenborough in that case is favorable to the plaintiffs. He says, in the testator himself, the standing corn, though part of the realty, subsists for some purposes as a chattel interest, which goes on his death to his executors as against the heir, though as against the executors it goes to the devisee of land, who is in the place of the heir. This is founded upon a presumed intention of the deviser in favor of the devisee. But this again may be rebutted by words which show an intent that the executor shall have it. In the case referred to, the devise to the executor was of "all other his personal estates of what nature soever;" here the bequest is of all "other personal property not herein otherwise dis-

Drake v. Jones.

posed of." The growing crop having passed to the devisees, there is nothing in the will which satisfies us that the testator intended that it should be taken from them.

Judge Richardson concurring, the judgment will be reversed and the cause remanded.

DRAKE, Appellant, v. JONES *et al.*, Respondents.

1. L., being indebted to D., E. and F., assigned to D. in trust to secure said D. E. and F. certain promissory notes executed by O. & R. One J. recovered a judgment against L. Afterwards said L., D., E., F., O. & R. entered into an arrangement, by which, upon the allowance of certain credits upon said notes, O. conveyed a certain lot of ground to L., and L. at the same time conveyed the same in trust to secure D., E. and F. The sum bid by D. at this sale was less than the amount of the indebtedness, to secure which the deed of trust was given. The land was sold under this deed of trust, and D. became the purchaser. J. caused an execution to be issued upon his judgment against L. and to be levied upon L.'s interest in said lot. *Held*, that L. had no interest in the lot upon which J.'s judgment might operate as a lien; that consequently no title would pass to a purchaser at a sheriff's sale under said execution; that an injunction would not lie to restrain a sheriff's sale thereunder.
2. Sheriff's sales can not be enjoined on the ground that they will pass no title and may cast a cloud on the title of the true owner.

Appeal from Hannibal Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Porter & Harrison and W. M. Cooke, for appellant.

I. Lowe had no beneficial interest in the land purchased by the notes belonging to the St. Louis creditors. The judgment in favor of Jones was not a lien upon the mere legal title in Lowe. (1 Paige Ch. 280; 5 S. & M. 702; Tallman v. Farley, 1 Barb., S. C., 280; Kiersted v. Avery, 4 Paige, 15; Whitworth v. Gaugain, 3 Hare, 416; Laughton v. Horton, 1 Hare, 549.) Again, Lowe never had such a seizin in the land as would subject it to the lien of a judgment. (4 Kent, 39.) Drake was entitled to his injunction against the

Drake v. Jones.

sheriff and Jones to restrain the sale under the execution. (See *Gamble v. City of St. Louis*, 12 Mo. 620; *Lockwood v. City of St. Louis*, 24 Mo. 21; *Petit v. Shepherd*, 5 Paige, 493; *Norton v. Beaver*, 5 Ohio, 178; *Wright*, 127; *Kenyon v. Clark*, 2 Rho. Is. 67; *Dyer v. Armstrong*, 5 Ind. 437; *Money v. Dorsey*, 7 S. & M. 727; *Wilson v. Butler*, 3 Munf. 559; 2 Sto. Eq. § 1503, *b.*, 701, 827, 698.)

T. L. Anderson, for respondents.

I. An injunction will not lie in a case like the present. (*Eden on Inj.* 12.) The inquiry in this case is not whether the plaintiff has a better title than Lowe, the defendant in the execution, nor whether any title will pass by sale under the execution; but whether the sale would impair the rights of the plaintiff.

RICHARDSON, Judge, delivered the opinion of the court.

In June, 1852, S. J. Lowe held three notes on Owsley & Reyburn amounting to \$5,000, due at different times; and, being indebted to the plaintiff and other creditors in St. Louis about \$4,500, he endorsed and delivered said notes to the plaintiff in trust for the purpose of securing the said debts. Afterwards, in October, as it was feared that the creditors would not realize their demands out of the notes held as collateral security, it was agreed that if Owsley would convey a lot in Hannibal, (together with the quit-claim deed of Robards,) the conveyance would be accepted in part satisfaction of said notes to the amount of \$3,500. As to Owsley, he was to receive an absolute credit on the notes for \$3,500; but as between Lowe and his creditors, the lot was to stand as security for their debt in lieu of the credit endorsed on the collaterals. Accordingly, it was agreed between all the parties that Owsley and Robards should convey the lot to Lowe and that Lowe should simultaneously execute a deed of trust on the same, in the usual form, for the purpose of securing the said debt to his creditors; and pursuant to this un-

Drake v. Jones.

derstanding Ousley and Robards executed and delivered to the attorney of the creditors a deed conveying the lot to Lowe, and at the same time Lowe conveyed the lot to Judge Cooke in trust for the purpose of securing the said debt of \$4,500. The debt named in the deed of trust not being paid, the trustee advertised the lot for sale according to the terms and stipulations of the deed, and at the sale the plaintiff became the purchaser, and received a deed. Ousley and Reyburn received a credit on the notes held by the plaintiff for \$3,500, and no part of the consideration for the conveyance was paid by Lowe and the deed never came into his hands. Between the time that the foregoing arrangement was agreed on and finally consummated, the defendant recovered a judgment against Lowe in the Hannibal court of common pleas, and in January following caused an execution to issue which was levied on the lot conveyed by Ousley and Robards; and the sheriff having advertised it for sale, the plaintiff filed his petition for an injunction on the ground that the judgment was not a lien as against the plaintiff's title, and that the sale, without passing any title, would cast a cloud on his title. The court granted a temporary injunction, but on the final hearing dismissed the petition and dissolved the injunction.

The endorsement of the notes of Ousley & Reyburn to the plaintiff vested in him the legal title to them, subject to a trust in favor of the creditors whom he represented, and the lot being purchased with the notes the creditors had the right in equity to pursue the fund; and consenting to the conversion of the notes into land, the trust attached to the land and the same interest resulted in the land that they had in the notes. The conveyance to Lowe clothed him with nothing but the naked legal title, and if he had not made the deed of trust the creditors could have asserted their equity against him, and he would have held the title as their trustee and subject to their beneficial interest. As the lot did not sell for enough to pay the creditors, Lowe had no

Drake v. Jones.

interest in it subject to execution, and the defendant by his judgment acquired no lien, and an execution sale under it would have passed no title. Lowe had only a transitory seizin for an instant; for, at the same time that the title passed to him, he conveyed it away, as he was bound to do, and as the creditors could have compelled him to do if he had refused. The lot did not vest in him for his own use, and he was a mere conduit for passing the title to the party entitled to it. If a defendant to a judgment purchases land and receives only a title bond, any interest which he has that is subject to execution is subordinate to the vendor's paramount lien for the unpaid purchase money; and so if he receives a deed, but at the same time executes a mortgage to the vendor to secure the purchase money, his transitory seizin would not be affected by a judgment lien, except for any interest that might remain after satisfying the mortgage. The effect would be different if a conveyance or mortgage is made to a third person not representing the purchase money. This principle is illustrated in the dower law. The widow is entitled to dower in all land of which her husband was seized during the coverture; but Chancellor Kent says that a transitory seizin for an interest will not give her dower, when the same act that gives the estate to the husband conveys it out of him, and that the right of dower only attaches when the land vests in the husband beneficially for his own use. (4 Kent, 39.)

Courts of equity sometimes entertain bills *quia timet* to prevent anticipated mischief, when a party attempts to do what he has no right to do, and when the injury, if suffered to be done, might not be reparable. But we think it would be unwise to permit a sheriff's sale to be enjoined because it will pass no title and may throw a cloud over the title of another. By our statute, it is not only the land of a defendant that is subject to sale under an execution, but any interest whatever, legal or equitable; and as a sheriff's deed will have no greater operation than the defendant's quitclaim deed, nothing will pass by a sale if the defendant has

no interest subject to execution. In some of the states a party out of possession is not permitted to sell land adversely held, but here he may multiply deeds that will not pass shadows, and it is never supposed that a sheriff's deed necessarily passes any thing; for if the defendant has nothing, nothing will pass. A plaintiff may experiment with his execution, and, after selling whatever interest the defendant is supposed to have, may abandon his purchase as not worth the expense of recording a deed; but to compel him to wait with his execution and become a party to a suit or as many suits as may be brought by strangers to the judgment claiming the property, would not only be transposing the order of trials by litigating a title before instead of after a sale, but would greatly increase useless litigation and prematurely bring on trials in equity proceedings before a sale, instead of trying the title in ejectment after the sale.

If the effects of a sale under the defendant's execution, whilst it passed no interest, would cast a hurtful doubt on the plaintiff's title, which he could only remove by evidence *in pais*, and the purchaser could stand by indefinitely and refuse to litigate his right until the evidence to repel it might be lost and the plaintiff less able to contest it, and in the mean time the true owner be unable to sell and afraid to improve and thus be denied the full dominion over his property, then the exercise of the power of the court by the writ of injunction would be properly invoked as a means of preventing injury and of precautionary justice. But our law has disarmed a person having no title of the power by false clamor to injure the title of another in that way. In the first place, provision is made with minute particularity for perpetuating testimony; and then again, if the plaintiff is out of possession, he may immediately bring his ejectment; but if he is in possession, and wishes to silence an adverse claimant, he may file a petition and compel him to bring an action to try the title, or be forever barred from claiming any right or title adverse to the petitioner. (R. C. 1855, p. 1241, § 62.)

Notice may be given at the sheriff's sale of the outstand-

Drake v. Jones.

ing equities of third persons, which will affect the purchaser; and if the defendant has no vendible interest, the purchaser will get nothing, and he will not be allowed to suspend a pretended title over the true title to the injury of the owner. A proceeding by injunction ought not to be substituted for the action of ejectment, and when the interest of a defendant is advertised to be sold under execution it would be improper to litigate and determine the title of as many claimants as there may be before a sale by an equity proceeding, when no real controversy might arise after a sale, and, if it did, the title could be better settled then than before.

Our first impressions of this question were the same that they now are, but the learned argument of the plaintiff's counsel created doubts that led us to a careful examination of the subject in all its bearings, which has resulted in the conviction, that, under our system of laws and the practice in reference to execution sales, it would be unwise and create great confusion in the administration of justice to permit sales under execution to be enjoined on the ground that they will pass no title and might cast a cloud on the title of the true owner. Several of the authorities cited from other states, as to the power to enjoin in cases like the present one, seem to be in point; but our system is different from theirs, and we think that sound policy requires us to deny the relief the plaintiff seeks in the form and at the time it was asked.

In our opinion, the bill was properly dismissed, although we think that Lowe had no interest in the property subject to the defendant's execution; but, of course, in assessing the damages, if the defendant has sustained any, on the dissolution of the injunction, the amount of his execution will not be considered, because he was only arrested for a time in the pursuit of a shadow.

The other judges concurring, the judgment will be affirmed.

Burns v. Patrick.

BURNS, Respondent, v. PATRICK *et al.*, Appellants.

1. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer.
2. Where it appears from the face of the record of a cause appealed to the supreme court that the plaintiff has no cause of action, the supreme court will reverse a judgment rendered in his favor, although the point upon which the reversal takes place was not brought to the attention of the lower court.

Appeal from St. Louis Land Court.

The complaint is in substance as follows: The plaintiff alleges that the defendants, "with force and strong hand, entered upon and into the following described land and premises [describing it], and broke open the doors and windows and other parts of the dwelling houses on said lot erected, and in which the tenants of this complainant then and there resided, and turned the said tenants of this complainant out of possession of said lot and tenements by force, frightening, threats and other circumstances of terror, which said tenants of this complainant so turned out of possession were [naming them]; and so this complainant charges that said Patrick and Ladd, with force and strong hand, on the day and year aforesaid, turned this complainant out of possession of the lot and tenements aforesaid; and this complainant further charges that the said William Patrick and Attilus A. Ladd detain now and hold, and from the 8th day of November, 1855, have detained and held, the lot aforesaid from your complainant. Wherefore your complainant prays," &c.

Todd and A. S. Jones, for appellants.

I. The complaint shows that at the time of the alleged entry the tenants of plaintiff were in possession of the premises. The landlord can not maintain the action. (24 Mo. 107; 26 Mo. 216.) The instructions given were erroneous.

Gray, for respondent.

I. It is too late to raise the objection that the complaint

Burns v. Patrick.

shows that the plaintiff's tenants and not the plaintiff were in possession and were forced out of the premises. (See 4 Mo. 445; 8 Mo. 59; 13 Mo. 455.) The utmost liberality is allowed in the construction of causes of action before justices of the peace. (15 Mo. 442; 16 Mo. 154; 20 Mo. 568; 21 Mo. 13; 24 Mo. 533; 25 Mo. 57; 23 Mo. 407.)

SCOTT, Judge, delivered the opinion of the court.

The plaintiff in this action can not recover on the ground that the defendants wrongfully and without force by disseizin obtained and continued in possession of the premises in dispute after demand made in writing for the deliverance of possession thereof, because there is no proof of any such demand in the bill of exceptions. There is a demand copied among the papers in the cause, but not being embodied in the bill of exceptions it can not be noticed by this court. Moreover, the complaint is so framed as not to bring it within that provision of the statute.

The complaint on which this proceeding is based shows that the plaintiff is not entitled to recover. The complaint is that the tenants of the plaintiff were turned out of possession; and if this was so, then the tenants should have instituted this proceeding. It is no answer to this objection that it was not raised in the court below by demurrer or in arrest of judgment. It is well settled that when a record is brought into this court, and it appears from the face of the record that the plaintiff has no cause of action, the judgment will be reversed, although the point was not made in the court below. This has been long the practice of this court. As liberal as the present practice act is, the defendant, by not taking the exception that the petition does not state facts sufficient to constitute a cause of action by demurrer or answer, does not waive the same. (R. C. 1855, p. 1231, § 2.)

We do not deem it necessary to review other points made in the cause, as they were mostly founded on the language of the various instructions and involved no principle.

Judgment reversed; the other judges concur.

McKnight v. McCutchen.

McKNIGHT, Appellant, v. McCUTCHEM, Respondent.

1. Where there has been no settlement of the accounts of a partnership and no balance ascertained, an action in the nature of an action of assumpsit can not be maintained by one partner against the other to recover such undetermined balance; it is not the province of the jury to take an account and adjust the equities arising out of unsettled partnership transactions.

Appeal from St. Louis Court of Common Pleas.

Casselberry, for appellant.

Johnson, for respondent.

I. One partner can not maintain assumpsit against another partner whilst the partnership concerns remain unadjusted. (Thompson v. Elliott, 5 Mo. 118; Springer v. Cabell, 10 Mo. 640; Murray v. Bogert, 14 Johns. 318; 17 Johns. 80; 11 La. 581; 2 La. Ann. 154, 277; Rice's Dig. 75.)

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff's petition is almost as general as the common counts in an action of assumpsit. The defendant denied all the allegations in the petition, and set up as a set-off a balance alleged to be due him on account of partnership transactions between him and the plaintiff. The cause was tried by a jury. It appeared on the trial that there had been a partnership between the parties in a mercantile adventure to New Mexico; that there was a loss on it, and that the defendant was indebted to the plaintiff, but there never was any settlement between them, or a promise by the defendant to pay any given sum. The court instructed the jury that the plaintiff was not entitled to recover.

It was not the province of the jury to take an account and adjust the equities of the parties arising out of unsettled partnership transactions and to strike a balance, for the law has provided a more reliable and accurate mode of ascertaining the rights of partners after a dissolution. After the

Leahy v. Dugdale's Adm'r.

facts of the case were developed by the proof, the plaintiff did not ask leave to reform his petition and make such averments as would entitle him to relief, and as he could not go to the jury on the case made, the instruction was properly given. It seems that if only one item of a partnership remains to be liquidated, one partner may sue another in assumpsit; (Byrd v. Fox, 8 Mo. 574;) but the law is well settled that when there has been no settlement of accounts, and no balance ascertained, one partner can not maintain assumpsit against another. (Stothert v. Knox, 5 Mo. 112; Springer v. Cabell, 10 Mo. 640.) This was the doctrine in Pennsylvania, where they have no courts of equity; and though it was argued that an action for money had and received should be allowed to perform the office of a bill in equity, Tilghman, C. J., said it was important that the forms of action should not be confounded, and that, as it would be extremely difficult and in many cases almost impossible to settle partnership accounts before a jury, it was most convenient that such accounts should be settled before auditors.

Judge Napton concurring, the judgment will be affirmed.

LEAHY *et al.*, Plaintiffs in Error, v. DUGDALE'S ADMINISTRATOR, Defendant in Error.

1. A contractor engaged in the performance of certain work may assign to another the money to be due to him on its performance.

Error to St. Louis Circuit Court.

Francis Dugdale contracted with the Central Plank Road Company to construct the eighteenth and nineteenth sections of said road. Dugdale afterwards entered into an agreement with Michael O'Leary and James B. Neenan, as subcontractors, for the construction of said sections. Said O'Leary and Neenan, after having performed about half of the work un-

Leahy v. Dugdale's Adm'r.

der said agreement, assigned the same to Patrick Leahy and Peter Neenan; also the money and debts due from Dugdale arising out of the construction of said sections; also all benefit and advantage to which they were entitled or might arise out of their contract with Dugdale on the construction of said road. Said Leahy and Neenan completed the construction of said sections. Dugdale had notice of this assignment to Leahy and Neenan. After the receipt of such notice he acknowledged, as garnishee of O'Leary and Neenan, indebtedness to the latter in various sums amounting in the aggregate to \$487.66, and paid the same to the creditors of said O'Leary and Neenan. The court instructed the jury that the plaintiffs were not entitled to recover.

Voorhis & Davis, for plaintiffs in error.

I. The action was properly brought in the names of the appellants. (Sess. Acts, 1849, p. 75; 20 Mo. 455; 21 Mo. 108; 18 Mo. 564.) The assignment to Leahy and Neenan passed all the interests, legal and equitable, under said contract of O'Leary and Neenan. (2 Sto. Eq. § 783; Adams Eq. 171; 3 Sand. Sup. 379; 20 Mo. 507; 1 Monr. 32; 2 Seld. 179; 5 Paige, 632.) It was not necessary to obtain the consent of Francis Dugdale to the assignment. (21 Eng. L. & Eq. R. 566; 3 Mass. 558; 2 Duer Ins. 57.) Dugdale had notice of the assignment before any garnishments were served upon him. (See 3 Foster, 245; 21 Mo. 138; 2 Seld. 179.) The work was completed by plaintiffs and the same accepted by the company, and Dugdale received payment for the same; he can not therefore, after having gathered the fruits of the labors of the plaintiffs, refuse to pay them. The assignment passed to the assignees all money due and to become due to the assignors.

A. J. P. Garesché, for defendant in error.

I. There was no privity of contract between plaintiffs and defendant. An executory contract can not be assigned by one party without the consent of the others.

Leahy v. Dugdale's Adm'r.

SCOTT, Judge, delivered the opinion of the court.

There is no doubt of the correctness of the proposition that an executory contract is not assignable. (Robson v. Drummond, 2 B. & Ad. 303; Chitty on Contr. 739.) But we do not conceive that this principle has any application to the circumstances of this case. There are contracts in which one party contracts for the personal services of another for his skill, knowledge and experience. In such cases the services of the person undertaking to do the work are engaged and he can not perform it by another. But in most contracts for labor the work may be done as well by one as by another. In many instances the contract is such that the contractor must necessarily engage assistance as he may be unable to do all the work himself, and such is the expectation of the parties when they enter into the contract. The contract involved in this suit is one of this character. The plaintiffs did the work under those who contracted with Dugdale. The company for whom the work was done accepted it and paid Dugdale. It is too late now for Dugdale to say he did not recognize the plaintiffs as contracting with him. In accepting pay for the work done by them, he at least recognized them as the agents for those who were bound by the contract to do it. They, then, were entitled to their wages. Dugdale knew that the money he received had been assigned to the plaintiffs. But for their services, he would perhaps never have received it. When a contract is being performed, it is competent to him who contracts to perform it to assign the money to be due on its performance, and especially to those who are actually performing the contract. Dugdale is clearly liable to the plaintiffs for all the money due them which he paid away after notice of the assignment.

Reversed and remanded; the other judges concur.

Jaccard v. Shands.—Miller v. Wall.

JACCARD *et al.*, Respondents, v. SHANDS, Appellant.

1. Fraud in the consideration of a negotiable promissory note is no defence to an action thereon by an endorsee to whom the same was endorsed before maturity without notice.

Appeal from St. Louis Court of Common Pleas.

H. N. Hart, for appellant.

SCOTT, Judge, delivered the opinion of the court.

This is an action on a negotiable promissory note endorsed to the plaintiffs before maturity. The defence is fraud in the consideration, and failure of consideration. Nothing is clearer than that such a defence is wholly inadmissible against the endorsee of a negotiable note, endorsed before maturity. The court very properly overruled the instruction asked by the defendant.

The other judges concurring, the judgment will be affirmed.

MILLER, Respondent, v. WALL *et al.*, Appellants.

1. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.)

Appeal from St. Louis Law Commissioner's Court.

Lackland, for appellants.

I. Justices of the peace have no jurisdiction of actions on penal bonds. They have jurisdiction only in the cases specified in the statute. No remedy is provided for the defendant in an execution. This case is outside of the classes of cases

Miller v. Wall.

referred to in the twenty-third and twenty-eighth sections. The suit, if maintainable at all, should have been brought in the name of the state. There is a misjoinder of defendants.

Voorhis, for respondent.

I. The case is clearly within the twenty-third and twenty-eighth sections of the eighth article of the act concerning justices' courts. (R. C. 1855, p. 968.) The action is properly brought in the name of Miller. This is not a suit on the official bond of the constable. It is the summary proceeding provided in the said sections. There is no misjoinder of defendants.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff brought a suit in his own name against the defendant Wall and his sureties on his official bond, before a justice of the peace. The ground of action is that Wall, as constable, with an execution in his hands against the plaintiff, levied on property which by law was exempt from execution.

As a general rule, suits on official bonds must be brought in the name of the state to the use of the party injured; (*Sickles v. McManus*, 26 Mo. 28;) but there are exceptions to this rule as to all the cases provided for in the twenty-third and twenty-eighth sections of the eighth article concerning justices' courts. (R. C. 1855, p. 963.) The only question in this case is whether the plaintiff's cause of action is embraced in either of those sections. We think it is not. The twenty-third section was designed to give a simple and speedy remedy to the plaintiff in a justice's execution, or any person who has placed a bond, note or account in the hands of a constable for collection, and the twenty-eighth section applies to persons who are interested in fees to be collected by a constable on execution; but neither section indicates any remedy for the defendant in an execution who may be injured by any unlawful act or omissions of a constable.

The other judges concurring, the judgment will be reversed.

Ridgley v. Steamboat Reindeer.

RIDGLEY, Respondent, v. STEAMBOAT REINDEER, Appellant.

1. The forty-second section of the act concerning boats and vessels (R. C. 1855, p. 313), providing that suits to enforce liens in any other than the first class shall, in St. Louis county, be commenced within six months, does not apply to causes of action that had accrued more than six months previous to the 1st of May, 1856—the day the revised code of 1855 went into effect.
2. Whether a default shall be set aside is a matter within the discretion of the courts to which application is made for that purpose.
3. Suits instituted in the St. Louis court of common pleas are triable at the return term "in all cases in which the parties continued to be proceeded against at such term shall have been personally summoned for at least fifteen days before the first day of such term;" (R. C. 1855, p. 1595;) inquiry of damages may be made at the return term in a case of judgment of default against a steamboat.

Appeal from St. Louis Court of Common Pleas.

This was an action against the steamboat Reindeer to recover the value of a slave alleged to have been transported out of this state in said steamboat. Judgment by default was rendered against the steamboat. This default the court refused to set aside.

G. P. Strong, for appellant.

I. The court should have set aside the default and permitted the defence to be made, and should have set aside the final judgment and permitted an answer and a regular trial. The discretion of the courts in the matter of setting aside defaults must be exercised in a reasonable manner. The affidavits show that the slave was not carried away by the boat.

II. The lien against the boat was discharged by the failure of the plaintiff to bring his action within six months after the cause of action accrued. (R. C. 1855, p. 313, § 42.)

III. The court erroneously refused to let the execution of the writ of inquiry be continued to the next term. There was no personal service in the case. It was a proceeding *in rem*.

Knox & Kellogg, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This suit was brought on the 10th September, 1856, on a cause of action alleged to have accrued on the 14th September, 1855. The forty-second section of the act concerning boats and vessels, in force when this suit was brought, required all suits upon liens given by the act, except those enumerated in the first class (of which this was not one), to be commenced (in St. Louis county) within six months. Before this law took effect, twelve months were allowed for suits of this character. The question is, whether the forty-second section of the act of 1856 applied to this case.

It is very clear that if this was an ordinary civil action and not one for a penalty, it was not barred, because it is not necessary in order to give reasonable effect to the statute of 1856 to give it any retrospective operation. As the statute did not prescribe any time within which suits upon past causes of action and not then barred by any existing statute should be barred, the reasonable intendment must govern that the act was designed to be entirely prospective, and was not intended to cut off causes of action which were not then barred by previous statutes. Any other construction would lead to suits clearly not contemplated by the legislature, and which, if foreseen, would of course have been provided for. On the last day of April, the day before the revised code of 1856 took effect, Ridgley had a cause of action which was not barred by any statute then in force. On the contrary, he had until the 14th of September, 1856, within which to bring his suit. If the revision of 1856 and the forty-second section be applied to this case, his remedy was not merely affected, but it was entirely cut off, for the six months had entirely expired. This was evidently not the intention of the law. Where the legislature intend to legislate upon past causes of action, as they may do in the opinion of some, they would of course give a reasonable time after the passage of the act within which to bring suits upon them.

These observations are made upon the assumption that there

Ridgley v. Steamboat Reindeer.

was nothing peculiar in this action distinguishing it from ordinary suits on contracts. It is urged that, admitting the law to be as above stated, it ought not to be applied to this case, because it is a suit for a penalty; that the legislature has a right to repeal a law giving a penalty at any time without just cause of complaint to any one; that there is no vested right in a penalty as there is in a contract; and therefore a strict and literal construction may with propriety be given to this forty-second section in the case now under consideration. It is no doubt true that there is no vested interest in a penalty, and that the legislature may repeal the law which gives it, at any time, without affecting the rights and interests of any one; but in this case they have not in fact repealed the penalty, nor have they in any respect changed the law as it stood before on this subject. The forty-second section applies in general terms to all the cases enumerated in the second, third and fourth clauses of the first section of the act, and it would be difficult to maintain one construction of the section in reference to one class of cases to which it refers, and another construction for another class. The section in terms makes no distinction and evidently designs none. That they had the right to make such a distinction can not alter the construction of the section; neither can the admitted existence of other remedies concurrent with this, as that is equally true of all the liens specified in the law.

The cases of *Field and Cathcart v. Mason*, 8 Mo. 687, and *Webb v. Coonce*, 11 Mo. 10, are sufficient to show that the refusal of the court below to set aside the default was not such an unwarrantable or improper exercise of his discretion as to justify the interference of this court. There was certainly negligence of the party, if not of his attorney; for the writ advised him in what court the suit was brought, and he gave a bond for the boat in which the same thing is recited.

It is objected that the inquiry of damages was executed at the return term of the writ. The twenty-ninth section of the

Papin v. Massey.

act establishing a land court in St. Louis county, makes all suits in this court triable at the return term (R. C. 1855, p. 1595), where the service is fifteen days before the first day of such term.

Judgment affirmed; the other judges concur.

PAPIN, Defendant in Error, v. MASSEY, et al., Plaintiffs in Error.

1. The commissioners appointed by the act of Congress of July 9, 1832, (4 Statutes at Large, p. 565,) were authorized to examine those unconfirmed claims only that had been previously filed in the office of the recorder of land titles; no new claims could be filed. After the passage of said act, claims undisposed of in the interval after their reservation from sale had ceased stood as they did before the passage of the act of May 26, 1824.
2. A confirmation by the act of Congress of July 4, 1836, (5 Statutes at Large, p. 126,) to a person or his legal representatives, will enure, if he had assigned his interest previously to the confirmation, or was dead at that time, to his legal representatives; that is, to his heirs or to the assignee of whole or part. If only part had been assigned, the assignee and heirs would take as tenants in common.
3. A., the owner of an unconfirmed Spanish grant for 30,000 arpens, entered into a bond with B., in the penal sum of \$20,000, conditioned for the conveyance by himself and his heirs of 14,000 arpens out of said grant of 30,000 arpens, provided said grant should be confirmed to the said A. or his representatives. Said grant was afterwards confirmed to said A. or his representatives. *Held*, that the confirmation enured to the benefit of B., as the legal representative of A., as to that portion (14-30) of the confirmed claim covered by said bond.
4. A party to a suit has no right to the reversal of a judgment therein for errors that do not in any way affect him, but other of the parties alone.

Error to Franklin Circuit Court.

On the 13th of October, 1797, James Mackay obtained from the Spanish government a grant of 30,000 arpens of land, which was located in separate tracts. The whole of said grant of 30,000 arpens was afterwards confirmed to the said Mackay or his legal representatives, by the act of Congress of July 4, 1836, with the exceptions made by the sec-

Papin v. Massey.

ond section of said act. Portions of said grant had been conveyed away by the United States previous to the confirmation. On the 10th of May, 1819, said Mackay executed and delivered to Charles Dehault Delassus the following instrument: "Know all men by these presents, that I, James Mackay, of the village of Carondelet, county of St. Louis, and Missouri territory, am held and firmly bound unto Charles Dehault Delassus, in the sum of twenty thousand dollars, money of the United States, to which payment well and truly to be made I bind myself, my heirs and successors, by these presents, sealed with my seal and dated this tenth day of May, year of Grace eighteen hundred and nineteen. The condition of this obligation is such, that if the above bound James Mackay, his heirs, executors or administrators, shall make or caused to be made unto the said Charles Dehault Delassus, his heirs or assigns, a deed of quit-claim for fourteen thousand arpens of land out of a grant of thirty thousand arpens of land granted to the said James by the Spanish government on the thirteenth day of October, 1799—partly surveyed under the Spanish government and partly under the American government—recorded in the recorder's office, book B, page 36; and situated on the rivers Cuivre, Bœuf and Bourbeuse—provided the whole of said grant of thirty thousand arpens be confirmed by the government to the said James or his representatives. But if the said government shall confirm to the said James as aforesaid only as many arpens as are contained in one league square, then and in that case the said James shall make the aforesaid deed of quit-claim to the said Charles for three thousand arpens of land only out of said grant and no more, and so in proportion shall be the division of any less quantity, always excepting and reserving from such division all the pieces or parcels of land which the said James gave already to those who settled on said grant—which pieces or parcels of land do not amount to more than twelve hundred arpens—then this obligation to be null and void; otherwise to remain in full force and virtue. [Signed] James Mackay (seal). [Test:] M. P. Leduc."

JUN 22 1819—42

Papin v. Massey.

On the 14th day of October, 1836, Delassus assigned and conveyed to Mary P. Leduc the above bond or obligation and all his interest in the tract of land mentioned therein. This assignment, though absolute on its face, was by way of security for a debt due from said Delassus to said Leduc. Mackay died about the year 1822, leaving a widow and eight children. Delassus died in May, 1842. Leduc died in 1842, devising his whole estate to Hypolite Papin. Said Papin also died in the year 1842, devising all his property equally to his children. In the year 1854, Joseph L. Papin, (plaintiff in the present suit,) who was administrator with the will annexed, of Leduc, commenced a suit in the St. Charles circuit court against the heirs and administrator of said Charles D. Delassus, to foreclose the equity of redemption of said parties. Said Papin recovered a judgment in this suit against said administrator for \$34,125, and the equity of redemption was foreclosed, and a sale of fourteen-thirtieths of said 30,000 arpens decreed. At the sale of that portion of said confirmation which is in controversy, said Joseph L. Papin became the purchaser, and received the sheriff's deed therefor.

This is a suit by said Joseph L. Papin for partition of two parcels of land situate in Franklin county, being part of said concession and confirmation of 30,000 arpens. Defendants Blumenthal and Whitmore assert title under the heirs of James Mackay. The court, after deducting a certain proportional interest, assigned to the plaintiff Joseph L. Papin fourteen-thirtieths of the residue. A sale of said tracts was decreed.

Dick and Knox & Kellogg, for plaintiffs in error.

I. The bond of Mackay was inoperative to create an equitable ownership in the land in dispute. It was optional with the obligor to perform the condition. (*State v. Woodward*, 8 Mo. 354; *Sweringen v. Christy's Adm'rs*, 24 Mo. —.) Mackay had no title when he made this bond. He never acquired the title. Any inchoate right of his was subse

Papin v. Massey.

quently barred. The grant to the heirs of Mackay of July 4, 1836, gave them the unencumbered title. (See *Strother v. Lucas*, 6 Pet. 763; 12 Pet. 453; *Le Bois v. Brammell*, 4 How. 459; *Landes v. Brant*, 10 Mo. 370; 15 Mo. 223; 16 How. 62.) The bond recited no consideration, and none was proven. To warrant a decree for specific performance a consideration would have to be proved. (Adams' Eq. 78, 80; 4 Johns. Ch. 500; 6 id. 224; 7 Dane's Abr. 543; *Moseley*, 37; 17 Mo. 242.) The deed of May 23, 1838, from certain of the heirs of Mackay to Leduc operated to merge and extinguish the bond. Besides, the bond itself was not legally proven. (Geyer's Dig. 127; 8 Mo. 481; 1 Dana, 166.)

II. The court committed error in holding that the form of the deeds to Whitmore and Blumenthal was such as to take them out of the protection of the registry law. It is only in relation to the common law release, which was a secondary conveyance, that it has been held that only what the releaser has passes. (5 Mo. 387; 8 Mo. 482; 9 Mo. 729; 11 Mo. 77; 7 Conn. 250; 21 Ala. 134.) The evidence did not prove actual notice of the bond.

III. Partition does not lie where plaintiff's title is denied.

IV. The court erred in admitting the record of the suit in St. Charles county; and also in admitting evidence of the transaction in 1822 between Leduc and Delassus, and in admitting the sheriff's deed to plaintiff. There was no privity between the parties to that suit and the defendants as to the title to this land.

S. T. & A. D. Glover, for defendant in error.

I. The bond of Mackay was operative to create an equitable estate in Delassus. (2 Sto. Eq. § 175; *Newland on Contr.* 307.) The confirmation was not to the heirs of James Mackay, but to Mackay or his legal representatives. (*Penrose v. Watts*, 8 How. 338.) The bond was properly proved. (6 Binn. 49; 1 Phill. 473, 466.) The bond was supported by a sufficient consideration. The seal imported a consideration. (6 Johns. Ch. 302; 3 Des. 341; 2 How. 426; *Par-*

Papin v. Massey.

sons on Contr. 354; 2 Mass. 162.) It ought to prevail over a subsequent purchaser who had notice. The evidence shows actual notice to Blumenthal and Whitmore. They claim under quit-claim deeds. The deeds from the Mackay heirs were operative to convey only such interest as they had. (13 Mo. 380; 20 Mo. 81; 3 Whea. 452.) The title in this case is denied by a part only of the defendants. The transaction between Delassus and Leduc was a mortgage. As a mortgage, it was necessary to foreclose it. The administrator of Leduc was the only proper plaintiff. The proceedings in St. Charles county were regular and were conclusive between Leduc's and Delassus' representatives.

Scott, Judge, delivered the opinion of the court.

The turning point in this cause is, as to the enurement of the confirmation made to James Mackay or his legal representatives by the act of Congress of July 4th, 1836. This confirmation embraces all the land the subject of this suit. The claim confirmed was filed before the commissioners, and was finally rejected in November, 1809. The appellant maintains that after this rejection the claim was by the act of 26th May, 1824, barred and extinguished; that under the subsequent act of July 9th, 1832, Mackay's old claim being dead, James Mackay's heirs appeared, claiming, and produced new testimony in support of their claim; and the claim being reported for confirmation and confirmed as stated, it enured to the heirs of Mackay. The second section of the act of 1832, in directing the commissioners to proceed to an examination of the claims with or without any new application of the claimants, never intended that the commissioners should examine any others than the unconfirmed claims before that time filed in the office of the recorder. No claim could for the first time be filed before the board organized by the act of the 9th July, 1832. The second section means nothing more than that the commissioners should act on the claims before that time filed, whether they were requested by the

claimants to do so or not. The privilege extended to the claimants to take new testimony was not designed to give them the right to file any new claim. The testimony taken could only be such as would support a claim already filed. What is there to distinguish this claim from all others acted on by the board? If this claim was dead and extinguished, why were not all the others in the same situation? Although in the interval between the 26th May, 1828—the last day for filing petitions under the act of 26th May, 1824—and the act of 9th July, 1832, for organizing the board, the reservation of these claims was taken away and they were subject to be sold as public lands, yet on the passage of the act of the 9th July, 1832, the reservation was restored. This restoration of the reservation made the undisposed of claims as though they had never been extinguished, and they stood as they did before the passage of the act of May 26th, 1824.

The claim, as has been stated, was confirmed to James Mackay or his legal representatives. The terms of the confirmation must determine the person to whom the claim is confirmed. There is no other guide. James Mackay, at the date of the confirmation, was dead. It enured then to his legal representatives. These representatives may be his heirs or assigns. If he had conveyed the claim, it would have enured to his assignee. If there had been no conveyance the title would have passed to his heirs. If only part of it was conveyed, the heirs and assignee would have taken it as tenants in common. This has been the uniform construction of a similar phrase in the recorder's certificates under the act for the relief of sufferers by the earthquakes in New Madrid. The confirmations under the act of the 4th July, 1836, have received a similar construction. Whatever may have been the language of the supreme court in the case of *Bissell v. Penrose*, the fact is that Rudolph Tellier showed himself to be the assignee of Benito Vasquez, one of the original grantors of the concession. But we do not conceive that there is any thing in that case which conflicts with any opinion expressed by us. There, the court refers to and

Papin v. Massey.

adopts the instructions of the commissioner of the general land office, in which is found the following passage: "You will make out a patent certificate in the name of the person to whom the land was confirmed, or his legal representatives, and the patent will be issued to the confirmer or his legal representatives, thus relieving you, as well as this office, from the labor and responsibility of examining and deciding upon all transfers or assignments of the claims, and leaving the genuineness and validity of such transfers to be decided upon by the courts of the state, which are the only proper tribunals for such investigations." (2 Land Laws, p. 747, 748.) In the case of *Bissell v. Penrose*, the confirmation was to Benito, Antoine, Hypolite, Joseph and Pierre Vasquez or their legal representatives; and Rudolph Tillier showing himself to be the assignee of Benito, the court held that the confirmation enured to him. That was a confirmation under the act of July 4, 1836. (*Hogan v. Page*, 22 Mo. 65; *Mercier v. Letcher*, id. 66.)

The next question in order is, whether the bond executed by Mackay, on the 10th May, 1819, to Delassus conveyed any interest in the concession to him. The bond is a penal one for the sum of twenty thousand dollars, conditioned that Mackay shall convey to Delassus fourteen thousand out of a concession of 30,000 arpens made to him by the Spanish government, if the grant was confirmed. This concession embraces the lands in dispute. Many objections have been made to this bond, and it was very zealously argued that it passed no interest in the land to Delassus. Although a deed could not have been required from Mackay until the land was confirmed, the title bond being as effectual in equity to pass an interest as an actual conveyance there was no necessity for a deed. This bond was executed after the introduction of the common law. Where a person has stipulated to do a particular act under a penalty in case of omission, and it plainly appears that the specific performance of that act was the primary object of the agreement, and the penalty intended to operate merely as a collateral security, though at

law the party might make his election either to do the particular act or to pay the penalty, a court of equity will not permit him to exercise such a right, but will compel him to perform the object of the agreement. It plainly appears from the bond that its object was to secure the conveyance of the land. It was then a contract which a court of equity would specifically enforce. If it was such a contract it created an interest in the land, for courts of equity regard that as done which a party agrees to do. A bond imports a consideration. To require proof of the consideration of a bond upwards of thirty years old, would have the effect of declaring all such instruments of no avail. After such a lapse of time, it would be an accident if the consideration of a bond could be proved. Of what avail would be the rule of law which makes age prove the due execution of an instrument, if the consideration of it has afterwards to be established. In olden times the usual way of making a penal bond was to sign the obligatory part, and under the signature to write the condition, which need not to have been signed. The signature to this bond is under the condition, but that does not affect it. There is no foundation for the opinion that the owner of an inchoate Spanish grant could not affect it with equities as readily as he could lands to which he had a perfect title. Such claims were always held and esteemed as lands. They were transmissible by descent, devisable, could be assigned and transferred, were subject to execution, and could be affected with equities like any other real estate of which a person could be seized. Because the policy of the federal government did not permit these inchoate rights to be made a foundation for asserting a title as against the United States until their validity was recognized, that does not affect this question, which is, how these concessions were regarded by our laws, not how they were considered by the government of the United States as to itself. It is true that the courts can not decide upon the rights of the parties anterior to the confirmation in relation to the inchoate title and divert and alter the effect of the confirmation. But that

Papin v. Massey.

principle is not involved in this controversy. Its application would take the matter in dispute for granted. Those claiming under Delassus do not maintain that they have an equity to the inchoate title, which would give them a right to demand of the confirmee conveyance of the legal title granted by the confirmation, but they assert that by the terms of the confirmation they are themselves the confirmees. The principles which influence courts of equity in decreeing the specific performance of contracts can not have any application in this suit. As the legal title passed by the confirmation to those claiming under Delassus, there was no necessity for the interference of a court of equity.

If then those claiming under Delassus are the confirmees of the Spanish grant, then all questions as to the deeds from Mackay's heirs to Blumenthal and Whitmore are beside the case, so far as those claiming under Delassus are concerned. If the legal title passed to them by the confirmation, neither Mrs. Mackay nor the heirs of Mackay could affect it by their conveyances, as the confirmation enured as a grant to them. The heirs of Mackay could no more convey that title, so far as it enured to those claiming under Delassus, than they could convey the land of any other person.

We understand that Blumenthal and Whitmore alone complain of the judgment of the circuit court. They have no right to reverse that judgment for any errors which do not affect them. The plaintiff Joseph L. Papin was one of the heirs and devisees of Hypolite Papin, who was the devisee of Leduc, who claimed under Delassus. According to the theory of the case as stated by the appellants, he had an interest in the land then which entitled him to bring this suit. Now, that he claimed and had assigned to him more of Hypolite Papin's interest in the confirmation than he was entitled to does not affect Blumenthal and Whitmore. Increase or diminish Joseph L. Papin's interest in his father's share, and it does not lessen or affect the interest of Blumenthal and Whitmore. But if there were errors in the proceedings instituted to foreclose the equity of redemption of the alleged

Papin v. Massey.

mortgage, does it therefore follow that the validity of those proceedings can be contested in a collateral action? Admit the court erred in regarding Leduc's title as an equitable mortgage, yet when a sale was made under the judgment rendered, although that judgment was erroneous and might have been reversed, yet the title would pass. If the heirs of the mortgagee were necessary parties as plaintiffs or defendants—which is not at all certain, as under our system of law the legal title of the mortgagee can be passed by a judicial sale—yet the omission to make them parties would not render the judgment void. (Sto. Eq. Pleading, p. 183-4.) If an administrator should represent an absolute interest in the land to be but a mortgage and have the equity of redemption foreclosed, whereby the estate of which he had the charge was damnified, he would be liable on his bond for such mal-administration; and if he became a purchaser at the sale under the decree of foreclosure he would be a trustee for those to whom the estate belonged. In this proceeding the legal title is alone in question. Joseph L. Papin is possessed of that title. The judgment then was not erroneous in assigning to him all of Hypolite Papin's interest. In expressing this opinion, however, we do not wish to be understood as intimating that J. L. Papin may not be compelled to convey the legal title to the portions of the other heirs and devisees of Hypolite Papin. We do not consider that this judgment at all affects any right the other heirs of H. Papin may have to treat J. L. Papin as a trustee. Indeed we understand the petition as acknowledging the equitable rights of the other heirs in the portion assigned to J. L. Papin.

Judgment affirmed; Judge Napton concurs. Judge Richardson not sitting, having been of counsel.

Vallé's Adm'rx v. American Iron Mountain Co.

VALLÉ'S ADMINISTRATRIX, Appellant, v. AMERICAN IRON MOUNTAIN COMPANY *et al.*, Respondents.

1. Under the revised code of 1835 (R. C. 1835, p. 410) a mortgagee might, through an attorney in fact, acknowledge satisfaction of a mortgage on the margin of the record thereof; it was not necessary that such acknowledgment should be under seal, or that the agent should be authorized by instrument under seal.
2. Such an entry, except in giving notice, occupies no higher ground than an unrecorded release; a direct proceeding to set it aside is not necessary.
3. It was not necessary, under the revised code of 1835 (R. C. 1835, p. 410, § 13), in order to authorize an acknowledgment of satisfaction of a mortgage on the margin of the record thereof, that there should have been actual payment in money of the mortgage debt; it was sufficient that there was "full satisfaction" of the mortgage.
4. In a statutory proceeding to foreclose a mortgage, where the defendant sets up as a bar to the action an acknowledgment of satisfaction of the mortgage on the margin of the record thereof, the plaintiff may show in rebuttal that such acknowledgment was procured by fraud.

Appeal from Washington Circuit Court.

This was an action brought by the administratrix of the estate of Charles C. Vallé, deceased, to foreclose a mortgage. The petition set forth that said Vallé owned an undivided one-seventh of a tract of 20,000 arpens situate in St. François county; that said Vallé sold and conveyed his said interest to John L. Van Doren, defendant in this suit, for \$30,000; that on the same day Van Doren mortgaged the same to secure said purchase money; that Van Doren paid no part of the purchase money; that the American Iron Mountain Company holds title under Van Doren with notice. The American Iron Mountain Company, in its answer, admitted the mortgage, but alleged that it had been paid and satisfied, and that satisfaction thereof had been entered by Mr. Frissell, attorney in fact of said Vallé, on the margin of the record. Said acknowledgment, as given in evidence, was dated October 8, 1838, and was as follows: "Charles C. Vallé acknowledges to have received \$30,000 and the interest thereon in full of the mortgage recorded on this and the

Vallé's Adm'rx v. American Iron Mountain Co.

succeeding pages, and hereby discharges John L. Van Doren of all liability hereby contracted. [Signed] Charles C. Vallé, by his attorney in fact, M. Frissell."

The cause was tried by the court without a jury. The plaintiff asked the court to declare the law as follows: "1st, that the proof made by defendants that C. C. Vallé in his lifetime received stock in the Missouri Iron Mountain Company under an agreement to enter the mortgage satisfied, will not sustain the allegation in defendants' answer that the said notes and mortgage were fully paid to him in his lifetime; 2d, that nothing less than an actual payment of the money secured by the mortgage, in accordance with the conditions thereof, will sustain the defence set up in the defendants' answer; 3d, that the paper writing purporting to be a power of attorney to Mr. Frissell, read by defendants on proof of the signature of C. C. Vallé alone, is not of itself sufficient in law to authorize the said Frissell to execute an express release of the mortgage, or to enter satisfaction on the margin of the record so as to operate as an extinguishment of the mortgage." The court refused so to declare the law. Plaintiff took a nonsuit.

Noell and S. T. & A. D. Glover, for appellant.

I. The power of attorney to Mr. Frissell and the entry on the margin of the record were not legally sufficient to discharge the mortgage. The paper was not under seal. An attorney in fact could not, under the act of 1835, make this entry. To authorize this statutory release, payment of the money is a prerequisite in all cases. (See 2 Co. 340; 3 Pen. & Watts, 405; 2 Shep. Touch. 323.)

II. The court erred in excluding plaintiff's evidence in rebuttal to show fraud in the arrangement for entering the mortgage satisfied. (2 Barr, 105; 18 Mo. 170.) The evidence on the part of defendant showed that the defendant is not a *bona fide* purchaser without notice. (See generally 22 Mo. 85; 10 Watts, 397; 4 Paige, 127; 6 Johns. 109; 1 Pick. 347; 2 Root, 126; 4 Harr. & McHen. 219; 2 Ind.

Vallé's Adm'rx v. American Iron Mountain Co.

413; 2 Dev. & Bat. 530, 388; 1 Green. Ch. 118; Saxt. 204; 3 Edwards, 427; 1 Hill, 307; 1 Edwards, 232; 24 Verm. 70; 8 Gill, 31; 10 How. Prac. 528; 1 Whar. 392; 1 Hill, 532.)

B. A. Hill, for respondents.

I. The mortgage was personal estate and passed to the executor. (3 Burr. 978; 3 Johns. Cas. 329; 7 Mo. 466; 3 Hare, 405.) A mortgage is but a security for the payment of the debt, and when that is paid or extinguished it can never be resuscitated. (11 S. & R. 223; 5 Hill, 276.) The delivery of the stock certificates by the Mo. Iron Mountain Co. to C. C. Vallé in order to have the mortgage extinguished, and the surrender of the Van Doren notes to Frisell, the attorney of the company, was a payment of the mortgage. (See 31 Maine, 246; 1 Ohio, 469; 1 Cole, 187; 15 Verm. 374; 5 Metc. 310; 1 Halst. Ch. 32; 21 Pick. 230; 6 Barr, 230; 2 Har. & McHen. 917; 11 N. H. 474; 1 S. & R. 312; 1 Halst. 471; 2 id. 407; 4 Paige, 578; 3 Har. & McHen. 399; 8 Ohio, 22; 4 Kent, 193; 10 Ohio, 440; 3 Mass. 560; 11 Pick. 297; 16 Ala. 738.) There is no case made in the bill for the setting aside of the satisfaction of the mortgage; no issue made upon it. Fraud in the entry of satisfaction is wholly inconsistent with the bill for a foreclosure. The mortgage exists or it does not exist. If it exists, and is liable to foreclosure, there can be no charge of any fraudulent satisfaction of the mortgage, nor any claim made to set aside the satisfaction of the mortgage on the ground of fraud.

NAPTON, Judge, delivered the opinion of the court.

Two of the points made in this case relate merely to the forms which the proceedings assumed, and their decision either way can not terminate the controversy, or, indeed, have any material effect upon the result. The plaintiff insists that under the answer put in by the defendants no proof is admissible but of actual payment of the mortgage debt, and

that the court should have excluded all proof concerning the entry of satisfaction by the plaintiff's attorney upon the margin of the record, the power of attorney under which this entry was made, and the delivery of the notes secured by the mortgage to the plaintiff's agent. This testimony was however allowed notwithstanding the plaintiff's objections, and the plaintiff, in rebuttal, offered to show that this entire proceeding—to-wit, the delivery of the notes and entry of satisfaction—was brought about by the fraudulent and false representations of the mortgagor or his agents. This testimony was objected to as inadmissible under the pleadings, the petition being simply for a foreclosure under the statute and based upon the idea of a legal title in the mortgagee, which, being shown *prima facie* to have been extinguished by the entry of satisfaction upon the mortgage, put an end to the proceeding in a court of law, and placed the plaintiff under the necessity, if he desired to avoid the effect of this entry on equitable grounds, of resorting to his proceeding in equity to have it set aside. In other words, as the distinction between equitable and legal actions is abolished here, the objection of the defendants substantially is that the plaintiff's petition should have anticipated this matter and set up the fraud, so that the defendants could have been prepared upon that point.

Before determining these questions, it may be well to look at the objections taken to the sufficiency or legality of the entry of satisfaction upon the record of the mortgage, since these objections affect the essential right of the parties. By the law of 1835 (R. C. 1835, p. —,) under which this proceeding occurred, a mortgagee was authorized to acknowledge satisfaction of the mortgage upon the margin of the record thereof, at the request of the mortgagor, upon receiving full satisfaction of the mortgage. This acknowledgment of satisfaction on the record of the mortgage is declared by the law to have the effect of releasing the mortgage and barring all actions thereon, and revesting in the mortgagor or his legal representatives all title to the mortgaged prop

Vallé's Adm'r v. American Iron Mountain Co.

erty. The entry of satisfaction in this case was made by an attorney in fact of the mortgagee, and neither the entry nor the power of attorney under which it was made was under seal, nor was any money in fact paid; but the notes, to secure which the mortgage was given, were delivered up to the agent of the mortgagor. A technical release of a mortgage or a bond must be under seal; but courts of equity treat a mortgage rather as a simple *chose in action*, capable of being extinguished even by a parol release executed upon a sufficient consideration. (*Ackla v. Ackla*, 6 Barr, 228.) Our statute does not require the entry of satisfaction on the margin of the record of a mortgage to be under seal, and if an attorney in fact was authorized under the statute to act for his principal in a case of this kind at all, his authority of course need not be under seal, since the acknowledgment itself need not be in that form.

The statute of 1835 is silent in relation to the power of an attorney in fact; but the revised code of 1845 expressly authorizes the acknowledgment to be made by an attorney in fact. We do not infer from this circumstance that the power did not exist before the revision of 1845. It may have been thought a matter of doubt, and to relieve all embarrassment and put an end to any question on the subject may have been and probably was the motive for the provision in the code of 1845, which expressly gave the power. But it would be a very narrow construction of the first statute to deny to the mortgagee the power of acting through an agent—seeing that such a power already was possessed in relation to acts of a more solemn character, that he could by his attorney in fact execute a release of the mortgage. No motive can be perceived for such a restriction—no principle of public policy which it would promote—no safeguard to private rights which it would effect.

But it seems to be perfectly immaterial, in this case, whether an attorney in fact was authorized to make the entry of satisfaction or not under the act of 1835. Such an acknowledgment of satisfaction apart from the statute would

Valle's Adm'rx v. American Iron Mountain Co.

undoubtedly be treated as a valid parol release if founded on sufficient consideration. The statute appears to have but two objects in view in requiring this parol release to be entered on the record of the mortgage—one to give notice, the other to revest the title. As the validity of the entry of satisfaction is impeached in this case by the mortgagee, in whose name and by whose authority the entry purports to have been made, there can of course be no question of notice so far as he is concerned. The plaintiff will not insist that the present defendant had no notice, since his object is to affect him not only with notice of the entry, but notice of the fraud. The objections we are now considering, it will be observed, came from the mortgagee, the plaintiff; and it is apparent that, if the power of attorney was genuine and the entry made under the power, there was a parol release just as binding on him, if made upon sufficient consideration and without any fraudulent practices, as though it had been placed by himself upon the record in pursuance of the provisions of the statute of 1835. Notice was of no consequence to him, and, if he is right in supposing that the statutory entry could alone extinguish the mortgage and revest the legal estate in the mortgagor, that would at most only affect the form of the proceeding.

Our opinion however is, that, under the act of 1835, the entry of satisfaction might be made by the mortgagee through his attorney in fact. There is a material difference, we apprehend, between mortgages and judgments, so far as entries of satisfaction of either upon the record are concerned. An entry upon the record of the satisfaction of a judgment is record evidence of the highest character, and whilst it stands there unimpeached it is necessarily a bar to any action upon the same cause for which the judgment was rendered or in suit upon the judgment itself. A proceeding in the court where the judgment is rendered would be necessary to remove the bar. Whilst the entry stands, it precludes all inquiry in collateral suits. (Phillips, to use of Lippincott, v. Israel, 11 Serg. & R. 391.) But a mortgage is not

Vallé's Adm'rx v. American Iron Mountain Co.

supposed to occupy any higher ground than a bond or any other deed. The court, in whose clerk's office it happens to be recorded, has no peculiar or exclusive jurisdiction over it from that circumstance alone. The entry of satisfaction upon the margin of the book where it is recorded occupies no higher ground than an unrecorded release would, except to give notice. A direct proceeding in the court where it is recorded to set it aside is therefore no more necessary than a direct proceeding would be to set aside a deed on record by a party who had a deed subsequently recorded, but of which he claimed the other party to have had actual notice.

The answer of the defendants states that the notes were all fully paid to Vallé in his lifetime, and delivered up to the trustees of Van Doren (one of the defendants), except one note upon which judgment had been obtained in the circuit court of Madison county prior to October, 1838, (the date of the entry of satisfaction); and that before this time said judgment and notes were fully paid; that said Vallé, by power of attorney, dated, &c., authorized M. Frissell to enter full and complete satisfaction of the mortgage; that under this power said Frissell did, on the 8th of October, 1838, enter said mortgage satisfied upon the margin of the record of said mortgage, in the office of the clerk of the circuit court of St. François county. The defendants further claim to be *bona fide* purchasers of the mortgaged property for value, without notice of any equities between the mortgagor and mortgagee, and that they have made valuable improvements. It is contended that nothing short of actual payment in money could be given in evidence under this answer, and it is further argued that the entry of satisfaction authorized by the statute is only authorized when the mortgage debt has been paid in this way. The words of the statute are: "If any mortgagee receive full satisfaction of any mortgage," &c. "Full satisfaction," we apprehend, may be received in other modes than by the payment of money.

If the debt is extinguished by the reception of property or notes, or stock in satisfaction of it, such arrangement will be deemed a full satisfaction within the meaning of the statute. It depends altogether upon the intention of the parties. The word *payment* is not a technical one, but it includes not only payment of money, but something accepted in its stead. (2 Greenl. Ev. § 516.) Indeed, accepting a higher security is taken as conclusive evidence of satisfaction of a simple contract debt; and, on the other hand, if a promissory note is taken as a satisfaction by express agreement, it will be so held even where the debt is due by record. (2 Greenl. 519.) So the delivery and acceptance of bank notes, the debtor's own negotiable note, the note of a third person, or any specific article or collateral thing, in satisfaction of the debt, is admissible under the plea of payment. (3 Harr. & McHen. 399.) But the defendants' answer could hardly be construed as a mere plea of payment, under the old system of pleading, since it proceeds to state particulars, to aver the entry of satisfaction, the delivery of the notes and the authority of the attorney, which would seem to be sufficiently specific to attain all the purposes expected under our present practice.

The remaining point of practice questioned in this proceeding is the refusal of the court to let the plaintiff set up, in rebuttal of the defendants' proof of satisfaction, the fraudulent and false representations by which the entry was alleged to be obtained. We have already concluded, from the distinction between these statutory entries upon the record of a mortgage and those which occur in the record of a judgment, that no direct proceeding in the court where the record is made is necessary in the case of mortgages, as it would probably be in the case of judgments; and in this view it is obvious that the question is one merely of practice. It is every day's practice in ejectment for a plaintiff holding a junior deed to show that the defendant's elder deed was obtained by fraud, without any averment of the fraud in the

Vallé's Adm'rx v. American Iron Mountain Co.

petition. So the plaintiff, holding under an elder unrecorded deed, can show that the defendant's junior deed, though recorded first, was obtained with actual notice of the prior deed, and this without any averments on the subject in the petition. A party in this condition may undoubtedly resort to a direct proceeding to set aside the conveyance he supposes to be an improper or fraudulent obstruction to his recovery ; but the practice has been more frequently to try the question in ejectment. We are unable to see any distinction between these cases and the present. The plaintiff asks the court to foreclose his mortgage ; the defendant sets up a bar in the shape of an entry of satisfaction on the record of the mortgage, which, *prima facie*, is a complete answer to the plaintiff's petition ; the plaintiff replies that this entry was procured by fraud. That fraud vitiates such a transaction, as it does all others of similar character, can not be doubted, and that the question may be as well tried in this proceeding as in any other, is equally clear, and we do not perceive that there is any obstacle to its trial growing out of our present forms of practice. Of course, the fraud must be brought home to the present defendants ; if they purchased without knowledge of any fraud, the entry is conclusive as to them. But the plaintiff offered to prove, not only that the entry was obtained by fraud, but that the present defendants purchased with a full knowledge of that fraud. We think the proof should have been heard ; we shall therefore set aside the judgment of nonsuit and remand the cause ; Judge Scott concurring. Judge Richardson not sitting, having been of counsel.

THE STATE, Respondent, v. NORTH & SCOTT, Appellants.*

1. No state has power, under the constitution of the United States, in the exercise of its taxing power, to discriminate in favor of its own manufactures and productions and against those of its sister states. Such a discriminating tax, whether levied on the goods and manufactures of sister states in the original unbroken bale or package in which they are brought into the state, or upon the same after they have become incorporated into the mass of property of the state, would be unconstitutional and void.
2. As a state can not, by a direct tax on the manufactures and productions of sister states, discriminate against them, so it can not accomplish such a result indirectly by requiring a merchant dealing in such manufactures to take out a license and pay a tax thereon, while it levies no such tax upon merchants dealing in articles of its own manufacture and growth.
3. The act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1072), so far as the same required merchants dealing in the manufactures of sister states to take out licenses from the state authorities and to pay a tax on the same, is unconstitutional and void. (NAPTON, Judge, dissenting.)
4. A state law requiring an importer of foreign goods, who sells the same in the original unbroken package, to take out a license from the state authorities and to pay a tax on the same, would be unconstitutional.
5. The provision of the constitution of the state of Missouri which declares that all property subject to taxation shall be taxed in proportion to its value does not require that all the property in the state shall be taxed, but that when any species of property is selected for taxation it shall be taxed in proportion to its value.

Appeal from St. Louis Criminal Court.

The following is the indictment in this case: "The grand jurors of the state of Missouri within and for the body of the county of St. Louis, now here in court, duly empannelled, sworn and charged, upon their oath, present that William North and William P. Scott—they being a partnership under

* The opinions of the judges in the above case are also applicable to the case of the State v. Doan and others, decided at the present term of the supreme court. The said case of the State v. Doan and others involved the same questions decided in the above case of The State v. North & Scott, and in the case of The State v. Shapleigh, reported ante, p. 344; also the further question of the right, under the act to tax and license merchants, to sell, without a license, in broken packages, goods the manufacture of sister states.—[REP.]

State v. North & Scott.

the name and style of North & Scott, late of St. Louis, in St. Louis county—on the first day of July, in the year of our Lord, 1856, and on divers other days between that day and the day of the finding of this indictment, at St. Louis, in St. Louis county as aforesaid, unlawfully did deal as a merchant, in the selling of goods, wares and merchandise not the growth, manufacture and produce of this state, and not unmanufactured articles the growth and produce of other states, by then and on said other days and times there selling as a merchant as aforesaid one thousand pairs of patent leather boots," &c., &c., "the same being goods, wares and merchandise, at a place then and on said other days and times occupied by William North and William P. Scott—they being a partnership of persons under the name and style aforesaid—for that purpose, to divers persons to the grand jurors aforesaid unknown, for the sum and price of six dollars for each and every pair of boots, pair of gaiters, and pair of shoes sold as aforesaid, without then and on said other days and times having a license therefor continuing in force; against," &c.

To this indictment the defendant demurred. The court overruled the demurrer. The cause was submitted to the court on the following agreed statement of the facts: "It is admitted by defendants that during the time covered by this indictment the defendants, as copartners, as charged, were doing business as merchants, and that they did deal in the selling of goods, wares and merchandise at a store occupied by them for that purpose at the county aforesaid, without a license therefor, and that in their dealing as merchants aforesaid they did sell manufactured articles which were of the growth and produce of the state of Massachusetts and other states of this Union, and were imported by them into this state and sold by them in the original packages as imported, of the description as charged in the indictment." This was all the evidence in the cause. The defendants asked the court to declare the law as follows: "If the defendants neither received for sale nor sold at their store in St. Louis any other goods except such as were imported into this state

from other states of the Union by defendants and sold by them in the original unbroken packages, as imported, then the defendants are not guilty and the court will so find." The court refused so to declare, but declared the law to be as follows: "If defendants were copartners in business as merchants, and during the time covered by the indictment did, at St. Louis county, deal in the selling of goods, wares and merchandise, as described in the indictment, which were articles manufactured in other sister states of this Union and the growth and produce of such states, and thence imported by defendants into this state and sold in the original unbroken packages, at a store occupied by them for that purpose, without a license authorizing them so to deal, they are guilty as charged in the indictment." The court found the defendants guilty.

Shepley, Gamble and Hannegan, for appellants.*

I. The judgment in the case of the State v. Shapleigh and others can not be sustained. The act of December 11, 1855, to tax and license merchants is, in design and effect, a tax upon property and not a license to pursue a particular avocation or calling. The merchant licensed pays according to the amount of property he has. The tax is not equal upon all. In the case of Nathan v. State of Louisiana, 8 How. 73, all engaged in the calling of broker or banker were taxed equally, regardless of the amount or kind of business. There was no attempt to tax a specific property under the guise of licensing an occupation. In the present case, some persons are exempt who receive for sale only a certain kind of property. The act professes to tax all merchants, but in reality imposes the tax for the licenses only upon those merchants who deal in foreign commodities and in manufactured articles, the products of other states. The tax is not a fixed amount to be paid by all in that business; it is not to be paid

* The three cases, State v. Shapleigh, State v. North & Scott, and State v. Doan and others, were argued and submitted at the same time to the supreme court.

by *all men* in that kind of business. It is not to be estimated on the amount of profits, nor by the amount of sales, but is simply a tax imposed upon particular kinds of property according to its value. If the legislature is prohibited from laying a direct tax upon any species of property, it can not effect the same object by requiring the person selling the article to pay a tax by way of license proportional to the amount he receives of the article. (See *Brown v. Maryland*, 12 Wheat. 419.) A person importing goods into this state from foreign countries, paying to the United States duties thereon and selling them only in the original unbroken packages, is protected by the constitution of the United States from being compelled to pay a tax thereon, or take out a license for the selling of the same. (*Brown v. Maryland*, 12 Wheat. 419.) The authority of the case of *Brown v. Maryland* has not been shaken by any subsequent decision. With the exception of Mr. Justice Daniel, none of the judges of the supreme court of the United States have expressed views antagonistic to the principles decided in that case, so far as it related to foreign commerce. The taxing of imports, while they remain in their original state as articles of commerce, is repugnant to the clause of the constitution relating to commerce, and also to that clause which declares that the states shall not lay imposts or duties on imports or exports. The power to regulate commerce is exclusively vested in Congress. The only question is, when does the power of Congress over the import cease?

II. A person importing goods into this state from sister states of this Union, and only selling and holding them in their original unbroken packages, is protected by the constitution of the United States from being compelled to take out a license for the selling the same or pay tax thereon. The decision in *Brown v. Maryland*, though the case only related to foreign importations, went to the full extent of holding that the traffic between the states was equally protected. None of the judges, except Mr. Justice Thompson, expressed any dissent from the reasoning or conclusions of the Chief

Justice. (See 2 Story on Const. 512, 516.) The power of Congress over the subject is exclusive. If exclusive only when Congress has acted upon the subject, then Congress has acted by willing that inter-state commerce should be free. It has in various ways regulated in reference to inter-state commerce. It has passed laws in relation to the transfer, enrollment, licensing and inspection of boats; the removal of obstructions in rivers that do not have any outlet to tide-waters; in the erection of light-houses on Lake Michigan; improvement of inland harbors on the rivers and upon Lake Michigan. So also the act in question is unconstitutional in that it conflicts with that provision of the constitution of the United States which provides that "all duties, imports and excises shall be uniform throughout the United States." So also it is repugnant to the constitution in that it is an attempt to regulate foreign and domestic commerce by making a discrimination in favor of home productions and against products of other states and imported goods, with a view of raising a revenue from the latter. The law is also in conflict with that provision of the state constitution which provides that "all property subject to taxation in the state shall be taxed in proportion to its value." (See *Gibbons v. Ogden*, 9 Wheat. 509; *License Cases*, 5 How. 504; *Passenger Cases*, 7 How. 283; *State v. Price*, 13 N. H. 578.)

Mauro, (circuit attorney,) for the State.

I. The act to tax and license merchants is constitutional. It is not a regulation of commerce, though some of its provisions may have a remote bearing and influence upon commerce. It does not prevent, nor does it seek to prevent, the importation of any kind of goods whatever, nor does it impose any conditions upon, or place any impediment in the way of, a free interchange of commodities with other states and countries. It simply imposes a tax by way of license upon the avocation of selling imported goods after the offices of commerce are accomplished, the goods are released from the grasp of the federal government, and they have obtained

State v. North & Scott.

a lodgment in this state and are fully under the protection of its laws. It is a revenue law. Conceding that it is a regulation of commerce, it is not therefore void. The states may regulate commerce so long as Congress does not intervene. (7 Pet. 251; 11 Pet. 102; License Cases, 5 How. 504; Passenger Cases, 7 How. 283.) The act does not impose a tax on property. It does impose a tax upon an avocation, and none the less so because the amount to be paid upon each license is graduated according to the amount of business done under it. (Nathan v. Louisiana, 8 How. 73; 5 How. 588.) A tax upon a vocation is not a duty upon imports within the meaning of the constitution of the United States. The case of Brown v. Maryland is distinguishable from the present. Under the Maryland act one sale was sufficient; it was immaterial whether the goods sold were upon ship board, in bond at the custom-house, or elsewhere. Under our act there must be a "dealing in the selling" at a store, &c., occupied for that purpose. The articles sold by the defendants had lost their distinctive character as imports. (See License Cases, 5 How. 504; Passenger Cases, 7 How. 283.) They had become confused with the common mass of property in the state. After their introduction the state may tax them. The law is not in violation of the nineteenth section of the bill of rights of this state. If it is a tax upon property, which is denied, it is an *ad valorem* tax.

SCOTT, Judge, delivered the opinion of the court.

The defendants, who composed a copartnership, were indicted, under the second section of the act entitled "An act to tax and license merchants" (R. C. 1855, p. 1073), for dealing as merchants without a license. On the trial, it appeared that the defendants carried on business as merchants; that they sold manufactured articles which were of the growth and produce of the state of Massachusetts and other states of the Union, and were imported by them into this state and sold in the original packages as imported. The

court declared the law to be, that if the defendants were copartners in business as merchants, and, during the time covered by the indictment, did, at St. Louis county, deal in the selling of goods, wares and merchandise as described in the indictment, which were articles manufactured in other sister states of this Union, and the growth and produce of such states, and then imported by defendants into this state and sold in the original unbroken packages, at a store occupied by them for that purpose, without a license authorizing them so to deal, they are guilty as charged in the indictment. The following instruction asked by the defendants was refused: "That if the defendants neither received for sale nor sold at their store in St. Louis any other goods, except such as were imported into this state from other states of the Union by defendants and sold by them in the original unbroken packages as imported, then the defendants are not guilty, and the court will so find."

The first section of the act to which reference has been made defines a merchant to be a person, or copartnership of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose. The second section of the same act imposes a fine of not less than fifty nor more than five hundred dollars upon every person or copartnership of persons who shall deal as a merchant without a license first obtained. The third section of the act provides that merchants "shall pay an *ad valorem* tax, equal to that which is levied upon real estate, upon all goods, wares and merchandise purchased by them, except such as may be the growth, produce or manufacture of this state, and except such manufactured articles as may be the growth or produce of other states." By the subsequent provisions of the act, a license is obtained by giving bond for the payment, on the first of November, of all taxes which may then be due for the twelve months ending on the first November upon the merchant's license as a vendor of goods, wares and merchandise. And it was made the duty of every licensed merchant, on the first day of November of

each year, to file in the office of the clerk of the court granting the license a statement of the amount of all goods, wares and merchandise (excepting such as may be the growth, produce or manufacture of this state, and except such unmanufactured articles as may be the growth or produce of other states) received for sale within the year then ending.

From the foregoing statement of the law and facts of this case, it will be seen that it presents the question of the power of the states, in the exercise of the right of taxation, to discriminate between products of this state and those manufactured in our sister states. It will be seen that the discrimination is made, whatever guise it may assume, or by whatever name it may be called. It clearly appears from the statute that it exempts from tax or license the merchant who deals in goods the growth or produce of this state, while those who deal in the like goods of other states are compelled to take out a license, which can only be obtained by paying an *ad valorem* tax on all the goods received for sale. And can a more important question arise affecting the peace of the states—one that more deeply concerns the harmony and good understanding towards each other which should pervade the several states composing this Union? Happily for the people of the United States they have a government that was organized in an enlightened age, when there lived men whose wisdom and intelligence were sufficient, and whose patriotism prompted them, to set forth the causes which led to its adoption. The papers and resolves, that had their origin in a desire to amend the articles of confederation, shed a great light to guide us in the interpretation of the powers of that government by which the old confederacy was replaced. The motives to the formation of the federal government were not only blessings in anticipation, but an anxiety to be delivered from evils wide-spread in their operation and threatening to deprive us of all the advantages derived from the toils and sacrifices of the revolution had a large share in promoting that great design. Some of the greatest of these evils had their source in the powers with which the states were sepa-

rately clothed of laying duties on imports and of regulating commerce; powers which, though the constitution considers as substantive and distinct, yet in their exercise frequently run into each other and mingle together. The extent to which the power to regulate commerce may be exercised can not be fully defined by prospective laws. It is a power whose exercise depends on contingencies which can not be foreseen. Motive agents not yet conceived may ultimately come into use, which may cause a necessity for the exertion of this power. It was said in the case of *Gibbons v. Ogden*, 9 Wheat. 1, that, as the words "to regulate" imply in their nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designed to leave untouched as that on which it has operated. But though the enactments of Congress for the regulation of commerce are supreme, and those regulations, whether they are express or arise by necessary implication, are equally binding, and supersede state regulation, yet it is conceived that the states, in the exercise of the power of regulating their own internal affairs—whether in enacting police laws, laws for the preservation of the health of their citizens, or laws for the improvement of their navigable streams—may, in an enlarged sense of the phrase, be said to exercise the power of regulating commerce; and such regulation will be constitutional, unless it interferes with provisions enacted by Congress in pursuance to the federal constitution. In this sense are understood those who maintain that the power to regulate commerce is concurrent between Congress and the states; that the power, in all its branches and ramifications, is not so exclusively vested by the constitution in Congress as that all state legislation, which may fall within the range of the power of regulating commerce, will be unconstitu-

State v. North & Scott.

tional, though not in conflict with any act of Congress. It would be a bold proposition that the states of this Union have a concurrent power, in the regulation of commerce, with the Congress of the United States, in all matters but those in which there is an express prohibition on them by the constitution. The power to regulate commerce with foreign nations and among the several states and with the Indian tribes having been conferred by the constitution on Congress, and the power to lay and collect duties and imposts being vested in the same body, with an express prohibition on the states, without the consent of Congress, from laying any imposts or duties on imports or exports except what may be absolutely necessary for their inspection laws, it is conceived that the history of the time during which the confederation of the United States of America existed, the form of government supplanted by the present constitution, will show that the law, whose validity is the subject of consideration, is in conflict with the spirit and meaning of the federal constitution.

A want of power to raise revenue for its support was not the only defect in the old confederation of the states as a system of government. The articles of confederation left the power of regulating commerce in the states, except the restriction contained in the sixth article, which was a limited and temporary one. The want of a single and united body to regulate commerce was sensibly felt and caused loud complaints against the government. The state of Virginia, which was always active in proposing and eager in accepting means offered for the alteration of the articles of confederation so as to endow them with greater energy and power, on the 30th November, 1785, resolved, "that the relative situation of the United States has been found on trial to require uniformity in their commercial regulations as the only effectual policy for obtaining in the ports of foreign nations a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities which can not fail to arise among the several states

from the interference of partial and separate regulations ; and whereas such uniformity can be best concerted and carried into effect by the federal councils, which, having been instituted for the purpose of managing the interests of the states in cases which can not be so well provided for by measures individually pursued, ought to be invested with authority in this case, as being within the reason and policy of their institution." These are the sentiments of a body of men, whose acts had an immediate agency in bringing about the measures that led to the adoption of the present federal constitution.

The "Federalist," after declaring that one of the principal purposes to be answered by the Union is the regulation of commerce with other nations and between the states, maintains that "a unity of commercial as well as political interests can only result from a unity of government ; that the competitions of commerce would be fruitful sources of contention. The states less favorably circumstanced would be desirous of escaping from the disadvantages of local situation and of sharing in the advantages of their more fortunate neighbors. Each state, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent. The habits of intercourse, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance. We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest. The spirit of enterprise which characterizes the commercial part of America left no occasion of improving itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade by which particular states might endeavor to secure exclusive benefits to their own citizens. The infraction of these regulations on the one side, the efforts to prevent and repel them on the other,

would naturally lead to outrages, and these to reprisals and wars."

Judge Marshall, who lived under the confederation and was an historian of the events of that time, says: "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them became so apparent as to render that power, in a great degree, useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." (12 Wheat. 446.)

These citations, coming from the sources they do, should be sufficient to satisfy us that the necessity for the regulation of commerce and the laying of imposts and duties by a single government were great and moving causes in the formation of the federal constitution, and that experience showed that the exercise of these powers could not be confided to the several states without causing rivalries, restrictions and exclusions, which would finally end in the termination of their union.

It has been observed that the law under review involved the exercise of the power by the state to discriminate in taxation between articles the manufacture of this state and those the manufacture of other states, and it may be added of foreign nations. As commerce may be regulated in many ways, it will not be denied that one of the methods of exercising

this power is the imposition of discriminating taxes or duties on articles the manufacture of other states or nations. During the existence of the confederacy, and at the time of the adoption of the federal constitution, the states do not seem to have turned their attention to the protection of domestic manufactures. The population being agricultural and commercial, its wealth was mostly derived from the sale and exchange of its products with other nations. Hence we do not find any complaints in relation to the imposing of discriminating taxes or duties, except so far as they may have been laid to counteract the policy of those states which, having a sea-board, would tax the imports or exports of other states, which, having no ports of their own, were obliged to export and import through the territory of the states more favorably situated for commerce. But, whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the states is entirely at war with the spirit of the constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they can not fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences. We all remember that some years ago, when it was proposed in our councils to lay a discriminating tax on the products of some of our sister states, that the measure had its origin in a feeling of hostility engendered by a course of conduct on their part conceived to be inimical to the policy of this state. Fortunately, the measure proposed was not adopted; and however much we may sympathize in the opposition to the conduct complained

of, we can not but express our satisfaction that our legislative records were not made to bear any such law.

But it is when considered in reference to our foreign commerce that this power in the states seems most destructive to one of the important ends proposed by the adoption of the federal constitution. After the treaty of 1783, foreign nations would not contract treaties of commerce and navigation with the United States. As there was no power to regulate commerce in the central government, they did not think it worth while to enter into obligations with a nation which had no legislative control over the subjects about which they would treat, and whose treaties might be frustrated by any member of the confederacy. Great Britain refused to negotiate with us on account of the weakness of our government and its want of authority to regulate commerce. Now that the power to regulate commerce has been delegated by the states, and the power of laying duties on imports taken away from them, can it be maintained that there is still an authority to lay a tax which shall discriminate between the products of the citizens of the states and the like products of foreign nations? What nation would treat with the general government, if the advantages secured to it by a treaty with that government were at the will of the several states composing the Union? If a foreign nation, for a fair equivalent, should obtain from the federal government the right to import its products free of duty, how would that government justify itself in the eyes of the world if the states composing the Union should single out the imports from that nation and subject them to a tax which would prevent a sale of them?

Under a power to levy a discriminating tax between domestic and foreign products, commerce may not only be regulated, but indirectly a duty may be laid on imports. In laying a tax discriminating against the imports from foreign nations or the sister states, a duty is as effectually laid as though the tax had been demanded before the importation was allowed. What is the difference between collecting the tax before the import is admitted and singling it out from all

others after it has been admitted and subjecting it to the same tax?

It is maintained that the supreme court of the United States, in the case of *Brown v. The State of Maryland*, 12 Wheat. 448, decides that, although the states can not tax imports while they are in the original bales or boxes in which they were imported, yet, when the boxes are broken up and the imported goods become incorporated into the mass of the property of the state, those goods become subject to taxation like all other property in the state. This is not denied. We do not conceive that the opinion, which denies to the states the power to lay discriminating taxes on the products of other states or of foreign nations, at all abridges or impairs the power in the states to lay and collect taxes. While it is admitted that all the property in the state subject to private ownership is liable to taxation, it is no diminution of this power so to limit its exercise as to prevent a discriminating tax between similar articles. The abolishment of the discriminating tax will be the means of increasing the revenue; as, if the tax on all the property is made equal to the discrimination, or if the property exempt by way of discrimination is made subject to taxes, the revenue will be increased. Can a restraint on the abuse of a power fairly be said to be a limitation of that power? Is it a diminution of the power of taxation to hold that the general assembly can not require that the property of the left-handed only shall pay all the revenue of the state; or that men born in a particular state shall bear all the taxes? Is it an abridgment of the power of raising revenue to maintain that a law can not be passed which imposes a tax on an article made in Boston, while a similar article made in Charleston is exempted? that a cloth manufactured in England shall pay a tax, while similar cloth made in France shall be free from taxation? Although the states may not be bound to find purchasers for goods imported into them, yet it is insisted that they can not so abuse the power of taxation as to drive an imported article from the market by an unfair and unequal discrimina-

ting tax. There is no difference in principle between laying a duty before an article is imported and the imposing a discriminating tax, which, after its importation and incorporation into the mass of the property of the state, prevents its sale. That which can not be done directly can not be done indirectly. (*Brown v. State of Maryland*, 12 *Whea.* 448-9.)

But it is said that the passage of the law under consideration is nothing more than the exercise of the power of laying taxes, a power unquestionably belonging to the states; and that its enactment was conceived in no design to regulate commerce with foreign nations or among the several states. It is true, in the law before us there is no discrimination against particular states or nations. It is against all states and nations. But, a power to discriminate against all carries with it a power of discrimination as to individuals. If the general power is sanctioned, it is not easy to perceive the principle by which it can be arrested in its more limited exercise. If a law actually violates the constitution, its nullity must be declared, notwithstanding there may have been no intent in the makers of the law to violate that instrument. The constitutionality of a law can not depend upon the motives of its makers. The uprightness of the intention of the lawgiver in the enactment of a law may excuse him in a moral point of view, but it can add nothing to its constitutional validity. When the state of Maryland imposed a tax on a branch of the Bank of the United States situated within her jurisdiction, the law could not escape the objections of its want of conformity to the constitution by the argument that taxation did not necessarily and unavoidably destroy. It was answered, that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that the exercise of such a power was inconsistent with the right of the government to use the means employed; and that they were not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of power? (4 *Whea.* 430-1.)

In *Brown v. The State of Maryland*, 12 Wheat. 439, it was said that "it is obvious that the same power which imposes a light duty can impose a very heavy one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. The question is, where does the power reside; not, how far it will be probably abused; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. When we are inquiring whether a particular act is within this prohibition, the question is, not whether the state may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause."

We do not conceive that this case involves the right of the state to tax professions, occupations or trades. Such a power in the states has been sanctioned in the case of *Nathan v. The State of Louisiana*, 8 How. 73. The same right was recognized in the case of *Brown v. Maryland*, 12 Wheat. 439; yet its recognition did not prevent the court from declaring a state law to be unconstitutional which required all importers of foreign goods by the bale or package to take out a license on which a tax was levied. So here, the question is not whether a license to do business may be taxed, but whether, under color of a license, a tax may be imposed which is not warranted by the constitution. If the tax is unconstitutional, the form by which it may be attempted to be collected is a matter of no importance. Can a state lay a discriminating tax on goods after their importation? If it can not do it directly, then the same thing can not be accomplished by any indirect means. The requiring of every dealer in goods which have been imported to take out a license, on which a tax is levied, is the same thing as imposing the tax on the goods themselves.

From the view we have taken of this subject, it will be seen that it is not deemed a matter of any importance whether the power of laying a discriminating tax is exercised

State v. North & Scott.

on the original package or bale in which the merchandise was imported, or whether it is exercised on the goods themselves after they have been incorporated into the mass of the property of the state. It is obvious that if the laying of a discriminating tax is unconstitutional, the time at which the power is exerted, or the condition of the goods at the time of its exercise, can not change the nature of the act.

We have not been enabled to ascertain that the question before us has ever received a direct determination. In the case of *Biddle v. The Commonwealth*, 13 S. & R. 405, the law required every person dealing in the selling of any goods, wares, or merchandise, wines or distilled liquors—except such as were of the growth, produce or manufacture of the United States—to take out a license for vending such goods, for which license certain duties were to be paid. There was also an exception in favor of importers who sold in the original cask, case, box or package, in which the goods were imported. The court held this law to be constitutional. But in the opinion nothing is said in relation to the question of the power of the states to lay a discriminating tax against foreign merchandise. In the case of *Pierce v. The State of New Hampshire*, 13 N. H. 582, Judge Parker said: "Should an attempt be made by a state to prohibit the sale of imported iron, or salt, or sugar, or cotton goods, within its limits, or to tax articles the produce of another state beyond the rate of similar articles produced within its own borders, it would very readily be seen that such legislation was not a regulation of internal police merely, but that its design and effect, if admitted, must be the regulation of foreign commerce or commerce among the states also." In the case of the *People v. Huntingdon*, 4 N. Y. Leg. Obs. 197, Judge Smith concurs in opinion with Judge Parker, and adds: "Under whatever name or pretence such a law might be passed, it must be regarded as a fraudulent attempt to override the constitution, and hence could not be sustained." In the case of *Brown v. The State of Maryland*, 12 Wheat. 439, it was held that a law was unconstitutional which required all

importers of foreign goods by the bale or package to take out a license on which a tax was imposed. It was held that such a law violated the provision of the constitution which prohibited the states from laying imposts and duties on imports or exports, and also that which declares that Congress shall have power to regulate commerce with foreign nations among the several states and with the Indian tribes. Judge Marshall, after an able opinion against the constitutional validity of such a law, remarked: "In conclusion, it may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles." We do not consider that the "license cases," as they are termed, reported in 5 How. 504, as deciding any thing in hostility to the views we have expressed. Those cases stand on a ground entirely different from those on which our opinion rests.

The foregoing intimations of opinion on this question will be sufficient, we trust, to defend us from the imputation of introducing any novelty into our constitutional law. We have not sought this task; it has been forced upon us, and we have entered upon its discharge with a due sense of the responsibility under which we labor. If we have erred, we feel confident that we have erred on the side of safety and in a desire to cherish peace and good-will among the states of the Union. We do not conceive that the opinion that we entertain in the least injuriously affects the power of taxation of the state. On the contrary, by requiring the same tax to be levied on like articles produced or manufactured in this state, we rather increase the revenue. Nothing is to be gained by the exercise of the power of laying a discriminating tax. If it is lawful for one state to do it, it is equally so to the others. Laws will be passed in retaliation of those we may enact, and so we may be losers in the end. Situated as the state of Missouri is, she should be one of the last to enter on such a course of legislation. Without a sea-board, far in the interior, cut off from all outlets to foreign com-

State v. North & Scott.

merce, she would be one of the greatest sufferers in a contest of such a nature. If we have erred in applying to the law under consideration the principle that a tax discriminating between foreign and domestic articles can not be imposed, we feel confident, nevertheless, that the principle is a correct one. No one can rise from reading the history of the events out of which our present constitution had its existence, without a conviction that the power of laying a discriminating tax on the importations from other states and nations was never designed to be left with the several states. That is a power only to be exercised by a single body, and that body has been created with ample power for the protection of the interests of all the states.

The 19th section of the bill of rights, which declares that all property subject to taxation in this state shall be taxed in proportion to its value, has been repeatedly construed by this court to mean, not that all the property in the state must be taxed, but that when any article of property is selected for taxation, it shall be taxed in proportion to its value and not specifically; and the general assembly may therefore not only levy an *ad valorem* tax on the goods of merchants, but may also impose a tax on their occupation, to be collected in the form of license.

On the facts as agreed, the defendants should have been acquitted; and the judgment will be reversed and the defendants discharged from their recognizance; Judge Richardson concurring; Judge Napton dissenting.

NAPTON, Judge, dissenting. By the constitution of the United States, it is declared that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, or to the people." A power to tax all the persons and property and occupations within the limits of a state, is a necessary incident to state sovereignty; and if that power has been abandoned or restricted, the abandonment or restriction must be found clearly expressed, or necessarily implied, in the provisions of the

federal constitution. The prohibition ought to be plain or the implication necessary, since it is not to be presumed that the states would permit doubtful or refined construction to deprive them of so essential an element of existence.

No subject was more thoroughly discussed, none better understood or more generally agreed upon in the convention of 1787, than the propriety and necessity, conceded on all sides, of vesting the federal government with such powers as would effectually put a stop to the conflicting commercial regulations in the different seaboard states, which had produced a vast deal of complaint, a great amount of inconvenience, and probably real hardship upon the states in the interior or without harbors, and which, in truth, was one of the principal and immediate incentives to the meeting at Annapolis, which preceded the more general convention in Philadelphia. We learn from Mr. Madison's papers, as well as from the resolutions of several of the states, that this subject was the only ostensible avowed purpose which it was proposed to accomplish, although it was well understood that other changes in the old articles of confederation, vastly more important, were contemplated. Under these circumstances it would seem strange that the work of the convention, the constitution of the United States, should still leave it a debatable question to what extent it was designed to limit the taxing power of the states, and how far the taxing power of the two governments was designed to be concurrent over the same subject, and where it was intended to be exclusive in the one or the other. The result of their deliberations and actions is before us. The convention undoubtedly supposed they had accomplished every purpose deemed important or desirable on this subject by two provisions inserted in the constitution. One is a prohibition to the states from laying any imposts or duties upon imports or exports without the consent of Congress. The other provision invested Congress with the power to "regulate commerce with foreign nations, and among the several states." Beyond this the convention did not deem it necessary to go to secure the objects in view.

It is now contended and decided that the states can not levy a tax upon merchandise brought from foreign countries, or from other states, after it has become the property of their citizens, and after it has paid duties (if any were due) to the federal government, and it has passed from the hands of the importer and been distributed among retailers, or the original packages in which it was imported have been broken up, unless the same tax is levied on similar productions or similar articles of manufacture raised or made within the state where the tax is levied. Where is the provision of the constitution which imposes this restriction? The proposition is, that the power to regulate commerce with foreign nations and among the several states excludes all exercise of such power by the states, whether the ground be occupied by federal legislation or not. Be it so. This is not my opinion, nor was it the opinion of a majority of the supreme court of the United States, who decided the License Cases reported in 5 Howard. C. J. Taney, with Judges Nelson, Woodbury, Daniel and Catron, were of opinion that every object proposed to be accomplished, and which ought to be accomplished consistent with a due maintenance of state sovereignty and state safety, was obtained by construing this provision to yield a supremacy to federal legislation, and not to exclude necessarily all state legislation on the subject. The Chief Justice did not hesitate to express his alarm at the consequences of any other construction, and avowed his belief that it would "seriously impair the powers of taxation which have been heretofore exercised by the states." But let it be conceded that the power is exclusive. The question still presents itself after this concession is made, whether a tax upon foreign merchandise in the hands of retail dealers within this state, or of wholesale dealers (after the package is broken), is a regulation of commerce with foreign nations, or between the states, within the meaning of this provision of the federal constitution. Such a tax, it is admitted, imposes a burden on commerce to some extent; but because it imposes directly a burden on commerce, is it therefore a regulation

of commerce with foreign nations or between the states? If the answer to this question is affirmative, and such I understand is the conclusion to which a majority of the court has arrived, let us see to what results it leads. I can follow it to no other conclusion than that the legislature have no power to tax merchants or merchandise at all. How will you tax merchants without imposing a burden upon commerce? What law can be devised to effect such a purpose as this? Merchants are the persons by whom all the commerce of the country is conducted. They are the agents who exchange the surplus productions and manufactures of this state for those of foreign nations and sister states. Every tax upon the merchant, however small, whether exacted in the shape of a license or imposed in the form of an *ad valorem* duty, is a burden upon commerce; and if the legislature of Missouri have no power to impose a burden on commerce, they have no power to tax merchants or their effects.

A power to tax, said Judge Marshall, is a power to destroy. If taxes, then, upon merchandise or merchants are regulations of commerce within the meaning of the clause of the constitution referred to, the power to levy them carries with it a power to destroy commerce with foreign countries and between the states, and is totally prohibited to the state governments, as much as the power to tax the branch of the United States Bank was prohibited to the state of Maryland in the case from which Judge Marshall's sentiment has been quoted. But the proposition is, that the legislature may impose this burden upon commerce—may tax merchants and their importations from abroad, provided they will also levy a tax upon all similar articles manufactured in this state; or, if the tax is extended (as it formerly was) to foreign produce, it will be valid, provided similar productions of this state are also taxed to the same amount. In other words, if a tax is laid upon articles of foreign growth or manufacture in the hands of a retail merchant of Missouri, the same rate of taxation must be imposed upon similar articles of domes-

tic production or manufacture in the hands of the same merchant.

How the burden on commerce is to be diminished by this extended taxation, I do not see; but I do see the enormous injustice of the proposition. The effect is to throw the main burden of taxation upon the home manufacturer and agriculturist. As the law now stands, the farmer pays taxes upon his capital, upon his lands, his slaves, his cattle, horses, &c. The manufacturer does the same; he pays the taxes which this law now imposes upon all his property, all his manufacturing capital, whether houses, machinery, tools, &c. The proceeds of this capital, in the case of the farmer, are his hemp, tobacco, wheat, corn, &c. They are the income which, under the present law, is not taxed. The proceeds or income of the capital of the manufacturer are the manufactured articles now proposed to be taxed. True, the tax is to be levied in the shape of a merchant's license, and is to be paid by the merchant first. But upon whom does the burden fall at last? Will the commission merchant take the tobacco, wheat and hemp of the farmer, pay the tax on it which is levied on foreign hemp, wheat and tobacco, and not charge it to the farmer along with his commission when a settlement is made? Will not the merchant who sells by retail or wholesale the rope, glass, hardware, stoves, &c., consigned to him by the manufacturer, or sold to him as articles of merchandise, deduct from his sales and commission, or from the price he has absolutely given, the amount of the tax which he knows must be paid by him upon these articles as merchandise? Of course, the tax must come out of the farmer or manufacturer. The farmer then must become his own merchant, must take his tobacco to Liverpool, his hemp to Kentucky or New York, his wheat to whatever foreign market promises the best price, or he must submit to a tax upon his *income* in addition to that he now pays on his *capital*. The manufacturer must take his bale rope and bagging to a cotton-growing region; his glass, nails, castings, &c., to whatever market abroad may be the best, or pay a

tax through the merchant upon his entire income also. *The merchant pays no such tax.* His capital only is taxed and not his income. Nor is an income tax levied on any other industrial class of the community. It will be seen at once that if the merchant who acts as a broker to dispose of the tobacco, wheat and corn of the farmer, or the bale-rope, nails, or white lead of the manufacturer, or who purchases these productions and manufactures as merchandise with a view to resale, is compelled to pay a tax on their value equal to the tax levied on similar articles imported from abroad, the weight of this taxation falls on the farmer and manufacturer and not on the merchant, and the farmer and manufacturer have to bear a burden of taxation not imposed upon any other pursuits. In short, their property is taxed twice, substantially; first, in the shape of capital, and secondly, in the proceeds or income of that capital. This is what I call discrimination—discrimination against the farmer and domestic manufacturer, and in favor of the productions and manufactures of other countries. As the law now stands, there is no discrimination of which any class of our citizens has a right to complain. The merchant does not pay taxes upon the manufactures of this state, simply because they have already borne their proper burden of taxation in the hands of the manufacturer.

But let us see how this discrimination or exemption of domestic productions affects commerce with foreign countries, or between the states. That it may indirectly affect such commerce is admitted, and so must every tax upon the merchant and upon his merchandise. But this does not make it unconstitutional, or we must cut off from the states all power of taxing articles imported from abroad. The primary object or effect of the law must be to regulate commerce, and not the mere incidental or remote effect which no revenue law can entirely avoid. It must reach the interests mainly of foreign countries or sister states, and not be confined in its operations to the interests and prosperity and internal commerce of this state. How does the law now in

question concern any government or people under the sun except those of Missouri? Leaving out of view the fact that Missouri productions are not taxed, and that thus far there is exemption or discrimination, all the world is put upon a footing so far as their intercourse with us is concerned. There is no discrimination in the amount of taxation, and none in reference to the place of production. Whether brought from the West Indies or East Indies, from Charleston or Boston, the tax is the same. No tax is levied on sugar made in Cuba which is not levied on sugar made in Louisiana. The law is wholly *infra territorial*, affecting the citizens of Missouri alone—reaching the public coffers of Missouri alone—touching the internal commerce of this state alone, excepting always that incidental and necessary tendency which every tax for revenue levied upon merchants has upon all commerce, both foreign and domestic. To tax a steamboat or the owner of a steamboat for the value of his boat is a tax upon commerce remotely, incidentally and necessarily. Can not the state of Missouri tax steamboats owned by her citizens, because they are vehicles of commerce and because such a tax necessarily imposes an indirect or even direct burden upon commerce? Yet, if the power to regulate commerce is totally denied to the states and exclusively vested in Congress, and every tax which reaches the interests of commerce and has a tendency to diminish or restrict it, either with foreign nations or between the states, is such a regulation of commerce as has been confided exclusively to the federal government, steamboats can not be taxed, merchants can not be taxed, and the limits of state taxation are exceedingly narrow. It is difficult to see how the states can tax any business whose range extends beyond her territorial limits, or any pursuit which is based upon an exchange of foreign for domestic productions.

Previous to the formation of the federal constitution and whilst the states were bound together by the articles of confederation, each state had its own custom-house and its own tariff. There was no uniformity, and some of the states, as

State v. North & Scott.

Mr. Madison informs us, taxed imports from others. Connecticut taxed imports from Massachusetts. Now, no state can tax imports or exports; no state has custom-houses or tariffs.

If the present revenue law is a tax upon imports or exports, I admit it is unconstitutional. That part of the act which taxes goods in the hands of the importer before the original package is broken, has already been passed upon, and, in conformity to the decision in the case of *Brown v. Maryland*, has been declared void. My opinion about the case of *Brown v. Maryland* has already been fully stated in the case of *Crow and others v. The State*, decided several years ago; and I shall not here repeat what was said there. Although the reasoning and judgment in that case is not in conformity to my views, yet I cheerfully submitted to abide by it, and to leave it to some future review of the same tribunal which decided it to be reaffirmed or overruled. I observe that the supreme court of Georgia have, in a recent case, totally repudiated the doctrine of *Brown v. Maryland*; and in 1825, before the case of *Brown v. Maryland* was decided, the supreme court of Pennsylvania, with Tilghman as chief justice, came to a conclusion, on the same question, just the opposite to that reached by the supreme court of the United States. (*Riddle v. The Commonwealth*, 13 S. & R. —.) The case of *Raguet v. Wade*, 4 Ohio, 407, is also hard to be reconciled with the case of *Brown v. Maryland*.

But let the case of *Brown v. Maryland* stand. That decision does not touch the question of discrimination. It admits the power of a state to tax imports, just as she has power to tax any other property of her citizens, after they cease to be under the protection which their character as imports gives them. And when is this point reached? After the goods have left the hands of the importer, or been broken up in their original package. When this point has been passed the case of *Brown v. Maryland* concedes the full power of state taxation, and this concession determines the present question. If importations from abroad, so soon as they have

passed from the custom-house and been broken up in the possession of the importing merchant, or passed out of his hands into the possession of the retail dealer, are upon a footing with all other property owned by other citizens within the state, then they may be taxed or be exempted from taxation as the state chooses; for, in relation to all property which does not come from abroad, it is admitted that the state may discriminate. It is admitted that the state may tax slaves and omit to tax land; that the state may tax four year old cattle and exempt all under that age from taxation; that horses may be taxed and mules be left untaxed. How then can property brought from other states or from foreign countries occupy the same position with property raised or made here in reference to the taxing power of the state, unless the power of discrimination, selection or exemption exists in both cases? The thing is impossible. Either this imported property from abroad does not occupy the same ground with property which always was here, although it has paid duties and passed the point which Judge Marshall fixed as the terminus of the federal power, or it does. The supreme court, in *Brown v. Maryland*, declared that it did occupy the same ground; and if that be so, then the power of state taxation is not affected by any provision of the federal constitution, but depends altogether on the state constitution. By the latter instrument it is admitted that the power of discrimination is not taken away. Therefore the power of discrimination exists as well in reference to property which comes from abroad as it does in reference to that which is of domestic origin. But if importations from abroad do not cease to be imports within the meaning of the constitution of the United States after they have paid duties, and after they have passed into the hands of retailers, and after they have, as Judge Marshall expressed it, been mixed up with the other property of the state, when do they lose this character? Do they retain it always? Judge Marshall, it is true, said an import was a thing imported; but he saw there was a point when things imported fell as completely within the tax-

ing power of the states as though they had never possessed the character of imports. He admitted his general reasoning was subject to limitations ; that it would be a fatal blow upon the states to deprive them of the taxing power over property which came from abroad, merely because it was from abroad. Hence he assigned a limit, and that limit has been passed in this case, and the property, although imported, has ceased to be an import, but occupies precisely the same ground with any other property belonging to citizens of Missouri, and found within her territorial limits.

If a farmer of Missouri imports thorough-bred cattle from Kentucky, do not these cattle fall within the taxing power of this state just as well as the cattle owned by the same farmer raised here ? If so, have not the legislature the same power to tax or to omit to tax them, or the same power to tax them and omit to tax the home-bred cattle, which they are conceded to have in reference to every other species of property liable to taxation ? How is the case altered by supposing that the cattle are imported by a trader, whom the legislature may, if they chose, call a merchant ? May they not require a license ? And is not the license an indirect tax upon Kentucky raised cattle ? And does it not affect commerce in cattle with that state ? Is not a tax upon horses and an exemption of mules from taxation a discrimination in favor of mules ? Yet the legislature may pass such laws. With their expediency I have no concern. It is the question of power of which alone I speak. What I maintain is, that the property of the merchant, after it ceases to be protected as imports, is just in the same situation in reference to state taxation in which all the other property of the citizens of the state is ; and this power is important to the preservation of the peace, welfare, health and morals of the citizens of the states, and may be safely entrusted to their legislatures. The constitution of the United States was based upon the supposition that the same amount of intelligence, discretion and patriotism was to be expected in the state government that was likely to be found in the federal government ; that lim-

itations or checks were essential to each ; but that abuses of power under either must necessarily be left to those motives of self-preservation, patriotism, and a regard for the public welfare, which would be likely to have as much practical operation among the constituents of the one as of the other.

It will be seen that the opinion, which maintains the concurrence of the power over commerce in the federal and state governments, affords an ample check against abuses of the power by the latter. The supremacy of the laws of Congress, when such laws are deemed necessary to abolish or prevent injudicious state legislation interfering with commerce with foreign nations or between the states, is admitted. In the present case the law is denied to be a regulation of commerce, and if it was admitted to have that effect, it would not therefore be invalid.

It may happen that property will be introduced into this state which is believed to be destructive of the health or morals of our citizens, or dangerous to the stability of our institutions. Have the legislature no power to prevent or to discourage the diffusion of such property by an increased rate of taxation, by licenses at high prices, or by such penalties upon its sale as would amount to a total prohibition of its circulation ? Yet, if the states have this power, its exercise will, to some extent, impair commerce, and, where the tax amounts to prohibition, will destroy it. The concession of such a power can not be made to consist with a denial of the power to discriminate by calling it a police power. The motive which prompts the passage of a law can not make it constitutional. The motive may be excellent, but if a state lacks the power, the law is invalid. The motive may be bad, yet, if the state possesses the power, the law is valid. It is a question of power. The word police has no magic in it ; it means simply the internal government of a state. A revenue law is a police law, as much so as a law to promote health or protect public morals. Neither the one or the other is valid, if the state has no power to pass it ; and no step in advance is made by determining the law to be beneficial to health or

morals. That is a question of expediency of which the legislature are to judge.

In a word, it will be understood that, in my humble opinion, the law now under consideration is not a regulation of commerce with foreign nations, or between the states; that it was not so intended, and has no such results; that, to make it such, every law, which imposes a burden on commerce or has a tendency to diminish foreign importations, must be held a regulation of commerce within the meaning of the federal constitution; that this doctrine annuls all taxation whatever upon merchants; that merchandise ceases to be imports, within the meaning of the prohibition in the constitution, when the duty to the federal government has been paid and the package is broken up in the hands of the importer or has passed to the retail merchant; that no other limit has been fixed by judicial decision; that if the merchandise which is thus mingled with the mass of other property is not liable to taxation because an import, then no tax can ever be levied upon importations; that there is no provision in the federal or state constitutions which prohibits such discrimination or exemption as is found in this law, and no decision of the supreme court of the United States or of any state court which has so declared it. I believe also that such laws are to be found in the statute books of many states, perhaps all; and certainly it has always been the law here. I therefore conclude with the words of Judge Woodbury from the bench of the supreme court of the United States, "it is perfectly competent for the states to assess a higher tax or excise by way of license or direct assessment on articles of foreign rather than domestic growth belonging to her citizens; and it has ever been done, however it may discourage the use of the former or lessen the revenue which might otherwise be derived from them by the federal government, or tend to reduce imports as well as to restrict the sale of them."

Egyptian Levee Co. v. Hardin.

EGYPTIAN LEEVE CO. Respondent, v. HARDIN, Appellant.

EGYPTIAN LEEVE CO. Respondent, v. CUMMINS, Appellant.

1. That provision of the constitution of the state of Missouri, which requires all property subject to taxation to be taxed in proportion to its value, is applicable only to taxation in its usual, ordinary and received sense, to taxation for general state, county, city and town purposes, not to local assessments, where the money raised is expended on the property taxed.
2. The act of February 27, 1855, (Sess. Acts, 1855, p. 73; also Adj. Sess. 1855, p. 28,) authorizing the Egyptian Levee Company, thereby incorporated, for the purpose of reclaiming a certain district from inundation by leveeing, ditching and embanking, to levy a tax *per acre* (not exceeding fifty cents) upon the land owners within said district, is constitutional; it is not in conflict with that provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value.

Appeals from Clark Circuit Court.

Bush, for appellants.

I. The charter, so far as it authorized a tax per acre, is unconstitutional. (Constitution of Missouri, art. 13, § 19.) This provision applies to counties and all corporations created by the act of the legislature, as much as it does to the state in raising revenue for state purposes. The state not possessing the power to levy an "acre tax," it could not delegate this power. If it can delegate the power to a special corporation, it can authorize a county court to raise a revenue for county purposes by a tax per acre.

Cowgill & Givens, for respondent.

NAPTON, Judge, delivered the opinion of the court.

These cases involve the same question. For the purpose of reclaiming from liability to inundation a district of country between the Des Moines, Fox and Mississippi rivers, in Clark county, a company was chartered by the legislature in 1855 (Sess. Acts, 1855, p. 74), authorized to construct levees and dig canals, and raise the fund necessary for such

construction by a tax, not to exceed fifty cents per acre, upon the landholders in the district embraced within the charter. Each land-owner was allowed a vote, in the control of this work, for every forty acres of land he owned in the limits. The towns of Alexandria and Churchville, with their additions, were excepted from the operation of the charter, although within the district of country embraced by it. At a subsequent session of the legislature, the charter was altered so as to authorize the tax to be as high as one dollar per acre. These suits were brought to recover some of these assessments, and the defence was, that the act of the legislature was unconstitutional because the land was taxed by the acre and not in proportion to its value.

That provision of our state constitution, which requires taxation to be proportioned to the value of the property on which it is laid, is only applicable to taxation in its usual, ordinary and received sense, and is therefore limited to taxation for general purposes alone, where the money raised by the tax goes into the state treasury, or the county treasury, or the general fund of some city or town, and is applicable to any purpose to which the legislative body of such state, county or town may choose to apply it; and is not intended to apply to local assessments, where the money raised is to be expended on the property taxed. These local assessments are not necessarily, under our constitution, apportioned by reference to the value of the property assessed, but may be regulated by the value of the benefit which the improvement, to which the money is devoted, is expected to confer on the proprietor. Legislative sanction of such assessments is usually brought about by the action of the parties interested, and it is for the legislature to determine in what ratio the burden shall be distributed. It ought to be according to the value of the benefit to be derived; but, if the plan adopted should not, in the opinion of the judiciary, attain the object, it is still not their province to interfere.

This restriction in our constitution is not without precedent; and the construction here given to it is sanctioned by

authority. Judge Martin says, in the case of the State v. New Orleans Nav. Co., 11 Mart. 309, "These words [impost, tax or duty] must be confined to the idea which they commonly and ordinarily present to the mind, exactions to fill the public coffers, for the payment of the debt, and the promotion of the general welfare of the country, not to a contribution provided to defray the expenses of building bridges, erecting causeways, or removing obstructions in a water-course, to be paid by such individuals only who enjoy the advantages resulting from such labor and expense." The ordinance of 1787 declared that "all the navigable waters leading into the St. Lawrence and Mississippi, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the territory as the citizens of the United States or those of any other state that may be admitted into the confederacy, without any *imposts, tax or duty* therefor." This provision was literally copied in the act of Congress of March 2, 1805, and it was held in the case from which Judge Martin's remarks have been transcribed that the charter of the New Orleans Navigation Company, which authorized a tax to be levied on vessels navigating the Mississippi for the purpose of raising a fund to be applied to the improvement of that navigation, was not a tax or impost or duty within the meaning of the act of Congress or the ordinance from which it was copied. In *Crowley v. Copley*, 2 Louis. Ann. 329, the same principle was decided. A law of that state required the owner of land on the Mississippi to construct levees or embankments; and, if the owner failed to construct or keep in repair his portion of the levee, an officer, called the district inspector, had the levee built or repaired and assessed the cost upon the land of the delinquent proprietor. This assessment was held not to be within the act of Congress, which exempted from state taxation all public lands of the United States for five years after they were sold under the directions of Congress. In the case of the Northern Liberties, &c., v. St. John's Church, 1 How. 10, the supreme court of Pennsylvania gave the same

Egyptian Levee Co. v. Hardin.

construction to the word "tax," and held that an exemption of church property from taxation was only applicable to taxation of a general character, and did not exempt the property from local assessments appropriated to the improvement of the property itself. The court said: "Taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations. They are imposed for a public purpose; whereas municipal charges are often for the benefit of lot-holders on a particular street, and the assessment, as in this instance, induced by the request, made known according to the charter, of a majority of the inhabitants." In the matter of the Mayor of New York, 11 Johns. 80, the same question arose and the same conclusion was reached as in the case of St. John's Church; and the court said upon this question: "The word 'taxes' means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word 'talliage;' (2 Co. Inst. 532;) and Lord Holt, in Carth. 438, gives the same definition in substance of the word 'tax:' To pay for the opening of a street in a ratio to the benefit or advantage derived from it is no burden. It is no talliage or tax within the meaning of the exemption. The provisions of the act refer to general and public taxes to be assessed and collected for the benefit of the town, county or state at large." The propriety of the distinction taken in these cases was recognized by this court in the case of Lockwood v. The City of St. Louis, 24 Mo. 20, and in Garrett v. The City of St. Louis, 25 Mo. 505.

In every form of taxation, whether general or local, it is certainly desirable and proper that the burden should be distributed as near as may be in proportion to the benefit derived; and constitutional injunctions and restrictions, where they have been attempted on this subject at all, are designed to promote this end. But where there is an absence of constitutional provisions, it is not in the power of the courts to enforce any fancied scheme of equality seeming to them more

just than the one adopted by the legislature. The latter department of government is wisely entrusted with the entire control of this subject ; and if practical injustice is done, the remedy is in the hands of the people. Equality of taxation may however be regarded as one of those Utopian visions, which neither philosopher nor legislator has ever yet realized. Approximation may be arrived at and ought to be, and to a reasonable extent attained ; but such is the infinite variety and complexity which human transactions assume that it surpasses the ingenuity of the political economist and practical politician to foresee exactly where and how the pressure of a proposed tax will fall. The present case may be taken as an illustration, and will show the folly of judicial interference. The charter of the Levee Company requires the tax to be regulated by the number of acres and not their value. This, upon first impressions, might carry an appearance of injustice ; but it is not very easy, from all the facts disclosed in the record of this case, to infer that any practical injustice whatever has been done. Lands in the neighborhood of Alexandria are rated at seventy-five dollars an acre, and, for aught that appears, were so rated before the company was organized. The lands of the complainants are only estimated at twenty dollars per acre. If the improvement increases the value of each class of lands *pari passu*, there is no injustice. If the levee or embankment and canals raise the price of Alexandria lands to seventy-five dollars per acre, and increase the value of the complainant's land, distant perhaps fifteen miles from Alexandria, to twenty-five dollars an acre, where is the hardship complained of ? Where lands were unequal in value before the proposed adventure or improvement, it was surely not the purpose of the company to bring these lands to an equality of valuation. It was not contemplated that land worth twenty dollars an acre should be brought up to a hundred, at the same time that land worth previously seventy-five dollars an acre should be raised to one hundred dollars per acre. This difference in value, if it arose from causes entirely independent of the overflow or

Cochran v. Goddard.

its prevention, must of course still continue after the completion of the works. Neither party has a right to complain if the increase of value in each has been in the same proportion to the original value in both cases. Indeed it is quite apparent that a taxation upon value and not quantity would in the hypothesis stated produce great inequality. The burden would not be distributed in proportion to the benefit. How this may be in point of fact, we of course do not pretend to know; but there is nothing in the record to show that the facts may not be exactly as we have supposed.

The other judges concurring, the judgment is affirmed.

COCHRAN *et al.*, Respondents, v. GODDARD, CLAIMANT, Appellant.

1. The only objection that can be entertained by the court—under the seventh section of the local act of March 3, 1853, concerning the duties of sheriff and marshal in the county of St. Louis, (Sess. Acts, 1855, p. 464)—to an indemnification bond demanded by the sheriff under said act is in relation to the sufficiency of the security; it can not be objected that the penalty of the bond is insufficient.
2. The action of the court under the 8th section is not conclusive on the claimant as to any other valid objection to the bond.

Appeal from St. Louis Court of Common Pleas.

Under and by virtue of an execution in favor of Cochran and Clark against Brooks, the sheriff of St. Louis county levied upon certain personal property as the property of said Brooks. Goddard made claim to said property as his own, and supported his claim by his affidavit as required by the local act of March 3, 1855. (See Sess. Acts, 1855, p. 464.) The plaintiff Cochran gave an indemnification bond, with two sureties, in the penal sum of \$2,400. The claimant, Goddard, moved the court to declare said bond insufficient on the ground that the actual value of the property levied upon greatly exceeded the amount of said bond. At the

Dodd v. Winn.

hearing of this motion the claimant offered to prove that the value of the property levied on and claimed was \$3,800, and not \$1,200 as stated in the indemnification bond. The court refused to admit the testimony, and overruled the motion.

N. D. & G. P. Strong, for appellant.

I. The court had authority, and ought to have exercised it, to order the sheriff to file a new or additional indemnifying bond. It ought to have heard evidence as to the value of the property. The bond was wholly insufficient in the amount of its penal sum.

RICHARDSON, Judge, delivered the opinion of the court.

The only objection which the court can entertain to a bond of indemnity, under the seventh section of the local act concerning the sheriff and marshal of St. Louis county, (Sess. Acts, 1855, p. 464,) is in relation to the sufficiency of the security; and of course the action of the court under the eighth section is not conclusive on the claimant as to any other valid objection to the bond.

The judgment will be affirmed; the other judges concurring.



DODD, Defendant in Error, v. WINN, Plaintiff in Error.

1. A release of one of several sureties by the creditors will discharge the others only so far as the released surety would be bound to make contribution if the other sureties or any of them should pay the entire debt.
2. A., the payee of a promissory note obtained judgment thereon against B., one of five sureties; an execution under said judgment was levied on property belonging to B. sufficient to make the debt; A. ordered this execution to be returned unsatisfied; A. subsequently commenced suit against C., another of said sureties; *held*, that if all the sureties were solvent A. could recover of C. only four-fifths of the debt; if all the other sureties were insolvent, he could recover only one-half the debt of C.
3. If one of several co-sureties is insolvent, the other co-sureties will be bound to make contribution as among themselves as if the insolvent surety had not been a surety at all. (See R. C. 1845, p. 1000, § 8.)

Dodd v. Winn.

Error to Ralls Circuit Court.

This was an action in favor of Levi Dodd against Isham O. Winn on a promissory note executed by David C. Glascock, M. McDonald, R. F. Richmond, Minor J. Winn, James G. Caldwell and said Isham O. Winn. The jury found the following special verdict: "We, the jury, find a special verdict as follows: On the 6th day of April, 1849, the plaintiff Dodd sued Minor J. Winn, on the same note now sued on, before the recorder of the city of Hannibal, the said Minor being one of the obligors in the note. Said Dodd recovered a judgment before said recorder against said Minor on the 6th day of April, 1850; and an execution was issued by said recorder on said judgment on the 11th day of April, 1850, and placed in the hands of the marshal of said city, and by him levied on a house in said city as the property of Minor J. Winn; that said marshal advertised said house for sale under said execution, but did not sell the house, being ordered by the plaintiff's counsel to tear down the advertisements and return the execution "no property found;" which he did; and no execution has since issued on said judgment by the recorder. The jury further find as follows, that when the marshal levied on the house as aforesaid, a part of said house was owned by said Minor J. Winn, which part so owned by him was worth the sum of \$137.50. Said house was standing on a piece of ground owned by Jeremiah Strode, who had leased it to said Minor J. Winn, with the privilege of taking off when he pleased any house he might erect thereon. Minor J. Winn had built the house in question on said lot, but had sold a part of it before the execution was levied as before stated. The jury further find that David O. Glascock was the principal in the note sued on, and that Minor J. Winn and Isham O. Winn were each securities for said Glascock."

The court rendered judgment on this verdict in favor of plaintiff for eighty dollars debt (four-fifths of the amount of the original note sued on), and assessed the damages for the detention thereof at seventy-six dollars.

Dodd v. Winn.

Lamb & Lakenan, for plaintiff in error.

[I. The plaintiff having levied upon a sufficient amount of property with his execution against M. J. Winn to pay his entire debt, and having afterwards voluntarily released said property, he thereby released each of the other co-securities from the debt. (See 7 Mo. 497; 24 Mo. 333; 26 Mo. 243; 16 S. & R. 252; 10 Paige, 16.) The co-securities may all have been solvent at the time of the release of the property from execution, and all may now be insolvent. The jury should have been required to find as to the solvency or insolvency of the co-securities.]

Porter & Harrison, for defendant in error.

[I. A creditor may discharge one security without discharging the other. The judgment below is not erroneous. (1 Sto. Eq. § 499; *Rice v. Morton*, 19 Mo. 263; 17 Mo. 399.)]

RICHARDSON, Judge, delivered the opinion of the court.

The law is well settled that a valid agreement between the creditor and the principal debtor to extend the time of payment, or any improper interference by the creditor with the process of law after the commencement of a suit, by which the surety may be injured or subjected to greater risk, or be delayed in the right on payment of the debt to proceed against the principal, if made or done without the assent of the surety, will discharge him from his liability; (24 Mo. 333; 26 Mo. 243;) and the relation of principal and surety or of co-sureties is not extinguished by judgment. (*Rice v. Morton*, 19 Mo. 263.) A release of the principal will discharge the surety, but one surety may be discharged, without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. (*Routon v. Lacy*, 17 Mo. 399.) The creditor can not, by discharging one, increase the liability of the other; and he will not be allowed, by discharging one, to impose on the other a greater proportion of a common burden

than in equity he ought to bear. At law, if there are several sureties and one is insolvent and another pays the whole debt, he can only recover against the solvent sureties their *pro rata* part as if all of them were solvent; but the rule in equity is more just and reasonable, and the insolvent's share is apportioned among those who are solvent. (1 Story Eq. § 498.) The eighth section of our statute concerning securities provides that one surety at the suit of another shall not be liable to pay more than his due proportion of the original demand, but what is his due proportion will vary according to the circumstances. Thus, if there are three sureties, and all of them are solvent, and one pays the debt, each of the others will be liable to him for one-third of the amount only; but if one of them is insolvent, the other will be liable for one-half.

In this case it seems that Glascock was the principal debtor, and that the other five parties to the note were sureties. Now if all the sureties were solvent, and the defendant paid the debt, he could only require M. J. Winn to contribute one-fifth part of it, and therefore could only ask to have one-fifth abated, and could only complain of the conduct of the plaintiff in releasing the levy of the execution to that extent. But if the other sureties are insolvent, M. J. Winn would be bound to contribute to the defendant one-half instead of one-fifth of the debt; in which case, if the plaintiff had released to M. J. Winn, he could only demand of the defendant the other moiety; and, on principle, the same result must follow if he could have made half the debt but for his improper interference with the execution. These questions can not be determined from the meagre statement of facts in the special verdict. It does not appear whether the other sureties were solvent or not.

The statute authorizes this court to remand a cause when the facts in a special verdict are insufficiently found; (2 R. C. 1855, p. 1301, § 35;) and the judgment then will be reversed and the cause remanded; Judge Napton concurring. Judge Scott not sitting.

Smith v. Rice.

SMITH, Appellant, v. RICE, Respondent.

1. The relation of maker and endorser of a promissory note so far continues after the recovery of judgments against them at the suit of an endorsee that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution.

Appeal from St. Louis Court of Common Pleas.

This was a suit by Irwin Z. Smith on two certain promissory notes against John Sigerson, the maker, and Anapias Rice, the endorser thereof. The suit was instituted in the St. Louis court of common pleas. After the institution of this suit, said Sigerson, on the 10th of October, 1857, confessed a judgment, in the St. Louis circuit court, on said notes in favor of said Smith. On the 19th of November, 1857, the following entry of record was made with respect to the judgment thus confessed: "Now at this day comes the plaintiff herein and consents and agrees that execution may be stayed upon the judgment obtained by him against the said defendant until the first Monday in October, 1858." In the suit instituted in the court of common pleas, the plaintiff, on the 27th of October, 1857, dismissed as to Sigerson and took a judgment by default against Rice. On this judgment an execution was issued and property belonging to Rice was levied on. Rice filed a petition in the court of common pleas setting forth the above facts and praying that said execution might be quashed and a satisfaction of said judgment against Rice entered. The court ordered "that execution against the said defendant, Anapias Rice, on the judgment be perpetually stayed." It is to reverse this order that the plaintiff appeals to the supreme court.

I. Z. Smith, for appellant.

- I. The record does not show that there was any valid agreement for the stay of execution. It was a mere order to the clerk. It might at any time have been countermanded.

Smith v. Rice.

(1 Bailey, 412; 9 Thomp. 382; 4 Strobb. 87; 11 S. & R. 179; 4 McLean, 87; 3 McLean, 376; 5 Wend. 505.) Even if the agreement was valid, it would not discharge the endorser. The rule that giving time to the maker discharges the endorser does not apply after judgment. (2 Chitt. R. 125; Sto. on Notes, 417; 8 M. & W. 669; Thompson on Bills, 542.) None of the rights of the endorsee were affected. By paying the amount of the judgment, he could have maintained an action against the maker for so much money paid. (Bullock v. Campbell, 9 Gill, 182; Hammond v. Freeman, 9 Ark. 62.)

Decker, for respondent.

I. If a principal discharges or gives time to the other principal, he discharges all the sureties, where such time is given without the consent of the other sureties. (2 Blackf. 14; 2 Ves. jr. 540; 12 Wheat. 557; 6 Pet. 250; 9 Barn. & Cress. 707; 10 id. 578; 3 B. & P. 363; 2 Camp. 179; 2 B. & P. 60; 8 East, 576; 15 id. 617; 4 Ad. & El. 577; 2 Swanst. 193; 4 Taunt. 456; 7 id. 126; 3 Esp. 46; 2 Meriv. 271.)

RICHARDSON, Judge, delivered the opinion of the court.

The doctrine may be considered as settled in this state—where law and equity are administered in the same form and in the same suit—that a judgment does not extinguish the relation of principal and surety; (Morton v. Rice, 19 Mo. 263;) and the same causes that will discharge a surety will discharge an endorser. (Bank U. S. v. Hatch, 6 Pet. 250.)

The entry in the record in the case of the plaintiff against Sigerson in the circuit court, on the 19th November, 1857, by which the plaintiff consented and agreed that execution on the judgment should be stayed, ought to stand on as high ground as an agreement of a like kind under seal, and is certainly evidence of a valid contract. The plaintiff put it out of his power to sue out execution before the first Monday of October, 1858, and the record entry operated as a valid contract for delay whereby the plaintiff suspended his remedy

Smith v. Rice.

against the principal for a stipulated period. The plaintiff had no right to receive payment of the judgment from Rice before October, 1858, because he had agreed with Sigerson to wait until that time; and if Rice had paid the judgment he would not have been entitled to immediate recourse on Sigerson, because the latter could not be compelled to pay the endorser any sooner than payment could have been demanded by the creditor; for, having secured an extension of time by a valid contract with a person authorized to make it, he would not lose the benefit of the indulgence by the premature payment of the debt by the endorser.

The principle on which the surety is discharged, when an agreement to give time for a sufficient consideration is made by the creditor and the principal debtor, is very clearly stated by Chancellor Kent, in *King v. Baldwin*, 2 Johns. Ch. 559: "The surety is entitled to pay the debt when it becomes due, or he may call upon the creditor, by the aid of this court, to enforce his demand against the principal debtor. On paying the debt, he is entitled to the creditor's place by substitution; and if the creditor, by agreement with the principal debtor without the surety's consent, has disabled himself from suing when he would otherwise have been entitled to sue under the original contract, or has deprived the surety on his paying the debt from having immediate recourse to his principal, the contract is varied to his prejudice and he is consequently discharged."

In this case the plaintiff could not proceed on the original debt, because it was merged in the judgment; and he could not enforce the judgment, because he had agreed to stay the execution. The courts will not inquire whether the delay has in fact been injurious, for the presumptive injury to the surety is sufficient to exonerate him. (*Hoffman v. Hurlbert*, 13 Wend. 377.) In the case for 6 Pet. 250, the Bank had instituted suit against the drawer of a bill of exchange, and the attorney of the Bank having made an agreement for a valuable consideration with the defendant that the suit

State v. McO'Brien.

should be continued without judgment until the term after that at which judgment would have been entered, it was held that the endorser was discharged.

The other judges concurring, the judgment will be affirmed.

THE STATE, Respondent, v. McO'BLENIS, Appellant.

1. In retaxing the costs in a cause, if the fees are not legally chargeable they will be disallowed; if the fee-bill on its face is illegal, it must be rejected; but if the charges are such as may have been legally incurred in the prosecution or defence of the action, the fee-bill will be taken to be *prima facie* correct, and the burden of showing its incorrectness is on him who objects to it.

Appeal from St. Louis Criminal Court.

In this cause, directed by the opinion of the supreme court, reported in 21 Mo. 272, a retaxation of the costs was had. In retaxing the costs, the court sustained the taxation against McO'Brien as originally made. Among the items charged against McO'Brien were the following: "Clerk Howard—indict. 50 cents—capias, \$1—recog. 25 cents—3 issues, 75 cents—5 continuances, \$1.25—fifty subpoenas in common for the State—15 subpoenas in common for defendants, \$32.50—six attachments in common for State—five attachments in common for defendants, \$11—two venire, \$1.50—3 juries, \$2.25—one hundred and thirty oaths, \$6.50—two verdicts, 50 cents—six law judg'ts, \$1.50—3 judg'ts, 75 cents—execution, \$1—\$61.25; Marshal Bayles, capias, \$1—190 subpoenas in common for State, \$95—57 subpoenas in common for defendants, \$28.59—five attachments in common for State, \$5—three attachments in common for defendants, \$3; two juries in common for defendants, \$1.50—two trials in common, \$2, &c.; jury tax in common, \$3." The fees of the witnesses "in common" for the State and those for the defendants in common were also taxed against McO'Brien.

State v. McO'Blenis.

The ground on which McO'Blenis moved the court to re-tax the costs was that he was not responsible for any costs incurred by the State in the prosecution of any one of the defendants but himself; that he should not be taxed for the costs of a witness unless known to be summoned at his instance, or unless known to be summoned by the State against him; that a general subpoena for the State in the case of the State v. Buntlin and others, was not necessarily for a witness against him; that a general subpoena for a witness on the part of the defence, issued in said cause, was not necessarily a subpoena on behalf of McO'Blenis; that he should not be taxed with the whole cost of the board of the jury, nor the whole costs of the judgments rendered, &c.

The court decided that the costs had been correctly taxed.

J. R. & R. F. Barrett, for appellant.

I. The taxation of costs is contrary to the opinion of the court and illegal. (See 21 Mo. 272.)

Decker and Voorhis, for respondent.

SCOTT, Judge, delivered the opinion of the court.

In retaxing the costs of a case, if the fees are not legally chargeable, they will be disallowed. If the fee-bill on its face is illegal, it must be rejected. But if the charges are such as may have been legally incurred in the prosecution or defence of the action, it will be taken to be *prima facie* correct, and the burden of showing its incorrectness is on him who objects to it. Applying this principle to the fee-bill before us, we do not see on what grounds we can interfere. The charges are such as might have been rendered in the cause in which they are entered. No evidence is preserved in the record, and we are without any means of ascertaining the sum really due by the appellant.

The other judges concurring, judgment affirmed.

Sawyer v. Mitchell.

SAWYER, Defendant in Error, v. MITCHELL, Plaintiff in Error.

1. Interest in the event of a suit does not render the person so interested an incompetent witness.
2. The fact that a person introduced as a witness had, before the commencement of the suit, received an order from the plaintiff for sum sued for, the order not being accepted in discharge of the debt due him from the plaintiff, and that he was authorized to bring suit for the plaintiff, does not disqualify him as a witness in behalf of the plaintiff; the suit is not prosecuted for his immediate benefit.

Error to Ralls Circuit Court.

Porter & Harrison, for plaintiff in error.

I. Hardin was an incompetent witness. (18 Mo. 564; 24 Mo. 262; 23 Mo. 182; 3 C. B. 299.)

S. S. Allen, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

A witness (Hardin) for the plaintiff, on his *voir dire*, testified that before this suit was brought the plaintiff had given him a written order on the defendant for the sum which was in controversy in this action; that the plaintiff was indebted to him and gave him the order for the purpose of enabling him to collect the amount and apply the proceeds to the payment of plaintiff's debt to him; that he did not take the order in discharge of his debt; that he presented the order to the defendant and its payment was refused; that he was authorized as agent for the plaintiff to institute this suit. On this, the defendant objected to the witness on the ground that the suit was brought for his use. The court overruled the objection and the defendant excepted.

We do not see the ground on which it can be maintained that this suit was brought for the use of the witness in the sense in which that phrase in the statute is to be understood. The law declares that an interest in the suit shall not disqualify a witness. At the same time it provides that neither

Johnston v. Mason.

party shall be a witness in his own behalf. We must bear this provision in mind in considering this question. There are cases in which the real plaintiff in interest (one so to all substantial purposes) is compelled to use the name of another in order to recover his rights, where he has as absolute control over the suit as though he was the nominal as well as the real plaintiff. It is to these the statute applies. An interest in the suit does not disqualify a witness. It is only when he is the real plaintiff in interest, compelled to use the name of another in asserting his rights, that he is disqualified. This witness was not disqualified. In no sense could it be said that this suit was brought to his use. If the suit failed, the witness would not have lost his debt. The plaintiff would still have been liable to him. He was not liable for costs. That the plaintiff intended or the witness expected to be paid out of the sum recovered, did not make him one for whose use the suit is brought.

The other judges concurring, the judgment will be affirmed.



JOHNSTON, Respondent, v. MASON *et al.*, Appellants.

1. The character of a notice to endorsers of the dishonor of a promissory note may be proven by parol testimony. A notice to produce the notice is not necessary.
2. After the plaintiff in an action against the endorsers of a promissory note has closed his testimony and an instruction has been moved upon it, it is not error to permit him to recall a witness to show the character of the notice given to the endorsers.

Appeal from St. Louis Court of Common Pleas.

Gray, for appellants.

Shreve, for respondent.

SCOTT, Judge, delivered the opinion of the court.

There was no error in permitting the plaintiff, after his case was closed and an instruction moved on it, to show the

Crow v. Coons.

character of the notice he had given the endorsers. (Rucker v. Eddings, 7 Mo. 115.)

By a reference to the forms appended to the revised code of 1855, it will be seen that the allegation that the endorser of a bill of exchange had "due notice" is sufficient.

A notice to produce a notice is not necessary. (Christy's Adm'r v. Horne, 24 Mo. 246.) The contents of the notice of the nonpayment of the note were legally proved by parol. Although the statute requires that notarial acts shall be recorded, it would not follow that a notice of nonpayment should be literally copied. A memorandum of the time and circumstances of the notice would be a compliance with the law.

The other judges concurring, the judgment will be affirmed.



Crow *et al.*, Defendants in Error, v. Coons, Plaintiff in Error.

1. A., a citizen of and residing in the state of Missouri, sold goods to B., who also at the time of the sale resided in said state; B. gave his note to A. for the indebtedness thus incurred; B. afterwards went to and became a citizen of California; A. transmitted said note to one C., an attorney at law in California, for collection; C., deeming it for the interest of A., surrendered said note to B., and received in renewal thereof another note from B.; this note was made payable to the order of "C., attorney of A.;" while this note remained in the hands of C., B. obtained a discharge therefrom under the insolvent law of California; C. afterwards endorsed the note to A. in Missouri, who commenced a suit thereon against B. *Held*, that the discharge under the insolvent law of California could not be regarded as a valid discharge by the law of this state.

Error to St. Louis Court of Common Pleas.

This was an action by Wayman Crow and others, members of the firm of Crow, McCreery & Co., on the following promissory note: "\$11,850. San Francisco, April 4, 1854. Six months after date, I promise to pay to the order of Lloyd Tevis, attorney of Wayman Crow, P. R. McCreery and Wil-

Crow v. Coons.

liam H. Barksdale, eleven thousand eight hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum from date until paid, for value received. [Signed] Benj. F. Coons."

The facts upon which the case was tried were all agreed and were substantially as follows: "That defendant on the 9th day of March, 1848, at St. Louis, executed to plaintiffs his promissory note of that date for the sum of \$8,951.83, payable to Crow, McCreery & Barksdale, or order, in eight months after the date thereof; the consideration of which said note was for goods sold by said plaintiffs to said defendant, of the value of the sum specified in said note; that said note was not paid at its maturity; that at the time of the making of said note both defendant and plaintiffs were citizens of the state of Missouri, where said plaintiffs have ever since resided; that afterwards and after the maturity of said note said defendant went to California and became domiciled there; that said plaintiffs sent out the above mentioned note to Lloyd Tevis, an attorney residing at San Francisco, in said state of California, for collection against said defendant; that said Tevis, deeming it for the interest of plaintiffs, his clients, so to do, delivered up to the defendant the above mentioned note, in substitution wherefor, at San Francisco, in said state of California, defendant executed and delivered to said Tevis the note now in suit and on file in this case, said defendant and said Tevis being then residents and citizens of said state of California; that said Tevis had no interest whatever in the note first above described; nor did he hold the note in suit for himself, but only as attorney for said plaintiffs; that the legislature of the state of California passed an act entitled 'An act for the relief of insolvent debtors and protection of creditors,' approved May 4, 1852, &c.; that after the making and delivery of said note by defendant to said Tevis, and while both said defendant and said Tevis were citizens of and residents in said state of California, and while said note was in the hands of said Tevis, and before any endorsement by him, the said defendant filed his petition in the

proper court in said state of California under said act and praying for the benefit thereof; that in his said petition, among other debts stated to be due by him, he did specifically and particularly set forth and name the said note now in suit in this court as being due to the payee therein named; that thereupon such proceedings were had in said court, that the said court did order, adjudge and decree that the said Benjamin-F. Coons should be released and fully discharged from any and all debts theretofore contracted by him and contracted after the passage of said act, and from any judicial proceeding relative to the same; that all said proceedings and said judgment were in strict accordance with the laws of California; that said note sued upon remained in the hands of said Tevis without endorsement at the time of the discharge aforesaid." The act referred to was made part of the agreed statement.

The court rendered judgment on the above facts for the plaintiffs.

Shepley, for plaintiff in error.

As between citizens of the same state a discharge under the insolvent laws of that state operates as a full discharge of all debts. At the time Coons applied for the benefit of the insolvent laws of California, the note now in suit was the only one upon which he was liable, and the only contract by which he was holden. The old note was surrendered to Coons. The new note was for a different amount. Coons stands in the same position here as any other citizen of California would, if Tevis had taken the note of that other person at the time of giving up the old note. At the time of the proceedings in insolvency the note here sued upon was in law and fact the property of a citizen of California, and was a contract between two citizens of California. Before endorsement, the plaintiffs could not have sued upon it. Tevis was the only person who could. (See 7 Mo. 298; 9 Mo. 168, 377; 19 Mo. 193; 12 Mo. 538.) The endorsement by Tevis was after the discharge. (See *Hall v. Boardman*, 13

N. H. 38.) The suit is founded on the note and not on an open account.

Gantt and *Sedgwick*, for defendant in error.

I. The contract was essentially a Missouri contract. The goods were sold and the original note was given at St. Louis, Missouri, both parties being citizens of Missouri. The subsequent renewal of the note at California did not in anywise alter it in this respect. Being a Missouri contract, the bankrupt laws of California did not discharge it. (See *Raymond v. Merchant*, 3 Cow. 147; *Keavill v. Fareira*, 18 Mo. 186; *Ogden v. Saunders*, 12 Wheat. 213; 10 Mass. 367; 15 Mass. 396; 18 Johns. 54; 2 Aiken, 12; 3 Conn. —; 4 Wheat. 122, 208, 209; 6 Wheat. 131; 2 Johns. 241; 1 Hill, 516; 4 Barb. 369; 6 Barb. 432; Chitt. on Contr. 593; 9 Mo. 58; 12 Pick. 580; 2 Blackf. —; 8 Pick. 194; 12 S. & M. 554; Story on Agency, § 154, 160, 169, 394, 403; 24 Verm. 33; 21 Pick. 486; 5 Mass. 491; 2 B. & P. 147; 13 Verm. 334; 2 McLean, 352; Chitt. Plead. 4, 5; 8 Conn. 60; 1 Johns. 139; 15 Johns. 1; 7 Mass. 37; 2 Pick. 86; 5 Pick. 7; 1 Mo. 237; 6 Johns. 94; 6 Shepl. 361; 4 Dev. 357; 6 Hill, 47.)

NAPTON, Judge, delivered the opinion of the court.

The judgment of the court of common pleas upon the agreed facts in this case is manifestly right, unless the note taken by Tevis in California in April, 1854, essentially altered the character of the transaction. Admitting that the form of this note had the effect of placing the legal title in Tevis, so that he could have maintained an action thereon, the question still arises whether the form of a contract is to conclude as on the question of beneficial ownership. That Tevis was a mere attorney of the plaintiffs appears on the face of the note; and if it did not, the facts show it to have been so beyond dispute. If a citizen of California purchases goods in St. Louis, and gives his notes for them to a mercantile firm here, and that note is endorsed to an attorney in California for the convenience of collection, does this circumstance

Ream v. Watkins.

make the note a California contract subject to be discharged by their bankrupt laws? The actual beneficial owners of the note reside here; and, if the note was not transferred nominally to a citizen of California, there could be no question made; and shall a mere change in the form of a paper, contrary to the intention of parties, be allowed to work an essential change in the rights conferred by it?

The case under consideration is stronger than the one put. Here the plaintiffs and defendant were all citizens of this state, where the original indebtedness arose from which this note of April, 1854, sprung. The defendant gave his note here for the indebtedness. That note was transmitted to the agent of the plaintiffs in California, where the defendant had gone, and it was given up for the renewed note now sued on. The plaintiffs were undoubtedly for all beneficial purposes still the owners of the note of April, 1854; and as they resided here the bankrupt law of California did not discharge the contract.

The other judges concurring, the judgment is affirmed.

REAM, BY NEXT FRIEND, Respondent, v. WATKINS, Appellant.

1. Where an employee, wrongfully discharged before the completion of his term of service, brings an action, before the expiration of such term, to recover damages for the breach of the contract, it is error to rule that the measure of damages is the contract price of his services for the whole term.
2. A child allowed by its father to leave home and to work and shift for himself may maintain an action in his own name to recover the value of services rendered by him.

Appeal from St. Louis Law Commissioner's Court.

Buckner, for respondent.

A. M. Gardner, for appellant.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff, who is a minor, commenced this suit by his next friend before a justice of the peace. In the statement

Ream v. Watkins.

filed with the justice, the plaintiff claimed a balance of twenty-two dollars and five cents for three months and fourteen days' work, at the rate of one hundred dollars per year, from the 23d of September, 1855, until the 6th January, 1856, when he was wrongfully discharged by the defendant; also sixty-seven dollars and seventy-five cents as damages for breach of a contract by which the defendant had engaged the plaintiff to work for him one year commencing September 23d, 1855, at the price of one hundred dollars per annum, enough to be paid at such times as the plaintiff needed it to purchase necessary clothing, and the residue at the expiration of the year. The suit was commenced January 23, 1856. The contract as proved was that the plaintiff was engaged by the defendant to work for him for one year at the price of one hundred dollars, of which twenty dollars were to be paid from time to time as the same should be needed. The plaintiff was discharged on the 7th January, 1856, and the main defence relied on was that his conduct was such as to justify his dismissal. The court instructed the jury that if the plaintiff was discharged before the expiration of the time for which he was hired, without good cause, he was entitled to recover the full amount of the wages for the whole term at the contract price.

This instruction was erroneous. In Smith on Master and Servant, 73 Law Lib. 90, it is said that a servant wrongfully discharged has two remedies, either of which he may pursue immediately on his discharge: "First, he may treat the contract of hiring and service as continuing, and bring a special action against his master for breaking it by discharging him, and this remedy he may pursue whether his wages are paid up to the period of his discharge or not; or, secondly, if his wages are not paid up to the time of his discharge, he may treat the contract of hiring and service as rescinded, and sue his master on a *quantum meruit* for the services he has actually rendered." The plaintiff can only recover in the latter form of action for the services actually rendered up to the time of his discharge, whilst in the former case he might

Ream v. Watkins.

recover something beyond the amount due at the period of his discharge. In the note to *Cutter v. Powell*, 2 Smith's Lead. Cas. 87, it is stated, with some hesitation, that a servant improperly discharged has another remedy, to-wit: "he may wait till the termination of the period for which he was hired, and may then, *perhaps*, sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service." But this proposition is doubted if not denied in a note to Smith on Master and Servant, (p. 90,) and in *Goodman v. Pocock*, 15 Q. B. 574.

The measure of damages, in an action for a wrongful discharge brought before the expiration of the term, is not necessarily the contract price for the whole term, because a plaintiff after he is dismissed may sue and recover a judgment and then obtain employment elsewhere, and receive for the residue of the term as much or more than by the broken contract he would have been entitled to if he had served his time out. The damages must depend on the kind of service to be performed and the wages to be paid, and allowance should be made for the time that would probably be lost before similar employment could be obtained. In some pursuits it may be almost certain that the dismissal of a person at a particular season will throw him entirely out of employment for the residue of the year; whilst in other pursuits similar employment could readily be obtained elsewhere on the same or better terms; and therefore the amount of damages is a question for the jury under all the circumstances of the case. In *Smith v. Thompson*, 8 C. B. 42, a clerk, who had been engaged under a contract for two years, having been wrongfully dismissed after one quarter's service, brought an action for such wrongful dismissal, and the jury having awarded him damages equal to a year's salary, the court refused to interfere with the verdict. This form of action treats the contract as continuing, but the action on a *quantum meruit* treats the contract as rescinded, and, therefore, it is said that in the action for a wrongful dismissal the wages due up to the time of discharge can not be recovered, but a count

Ream v. Watkins.

for wages may be added, and in that way the plaintiff may recover in one suit all that he is entitled to. The plaintiff in this case by his suit has affirmed the contract, but being an infant he had the right to avoid the special agreement, which was executory and for personal services, and recover a reasonable compensation for the work which he did. (*Lowe v. Sinklear*, ante, p. 308.)

The defendant asked two instructions to the effect that the plaintiff could not recover unless the jury found that he was entitled to contract on his own account, and unless his father had given his consent that he might work for himself. The obligation which the law imposes on the father to maintain his infant children gives him the right to the custody of their persons and to the value of that labor and services during their minority. But a father may emancipate his son and relinquish any claim to his services, and when he does so the child will be entitled to the fruits of his own labor until the father sees fit to resume his authority. (*Burlingame v. Burlingame*, 7 Cow. 92; *Corey v. Corey*, 19 Pick. 29; *Tillotson v. McCrillis*, 11 Verm. 479; *Jenison v. Graves*, 2 Blackf. 450.) The permission of the father to the son to work for himself may be inferred from circumstances, and the fact that a minor is suffered to leave his parent's house and go abroad to shift for himself ought to be satisfactory evidence of the parent's consent to the son's receiving and enjoying his own wages; otherwise he would be without the means of procuring bread. It was in evidence in this case that the plaintiff's parents resided in another state; and as it would not be presumed that he was from home without leave, it would be inferred as a matter of necessity that he had the right to work for himself in order to obtain a living. The defendant's instructions then ought not to have been given without proper qualifications.

As the case will be remanded, it may be observed that the remarks which fell from the witnesses about the state of the weather and the condition of the plaintiff's clothing at the time he was discharged, were irrelevant and improper; for

Newman v. Mays.

neither the plaintiff's right to recover nor the defendant's right to dismiss him depended on considerations of that kind.

Judge Napton concurring, the judgment will be reversed and the cause remanded.

NEWMAN, Respondent, v. MAYS, Appellant.

1. If relevant testimony with respect to an alleged written contract be introduced by either party to a suit, the other party is entitled to have said contract read in evidence.
2. A judgment will not be reversed on account of the admission of irrelevant testimony, unless it is calculated to injure the party complaining of its admission.

Appeal from Marion Circuit Court.

Lipscomb and *Anderson*, for appellant.

Dryden, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

The only error assigned is that the plaintiff was permitted to read in evidence a contract spoken of by the defendant's witness in his testimony. If any part of the witness' testimony was relevant, most certainly it was proper that the contract should be read under which he stated that he had made the payment. The plaintiff had the right, after the witness had testified in relation to the contract, to have it explained. If it had been in parol, he could have called for its terms and all its particulars; but being in writing, it was proper to produce it, and, after identifying it, to give it in evidence. But conceding that it was irrelevant, we can not see that it injured the defendant, and a judgment will not be reversed because irrelevant testimony is admitted, unless it is manifest that it was calculated to injure the party complaining of it.

The judgment will be affirmed; the other judges concur.

State v. Emnitz.—Lee v. Howe.

THE STATE, Appellant, v. EMNITZ, Respondent.

1. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant.

Appeal from Bollinger Circuit Court.

NAPTON, Judge, delivered the opinion of the court.

This was a recognizance to keep the peace, taken before a justice and returned to the circuit court. Upon the appearance of the prosecutor and the defendant in the circuit court, that court dismissed the defendant and refused to hear any evidence from the prosecutor and condemned him to pay the costs; for what reason the record does not satisfactorily show. The reason stated in the record proper is that no indictment was found by the grand jury; but this was no indictable offence, or may not have been. The reason given in the bill of exceptions is, that no other papers were sent up from the justice except the affidavit, warrant and recognizance. The statute does not require any thing to be sent up except the recognizance. (R. C. 1855, p. 1158, § 7.) When the parties appear, it is made the duty of the court to examine the evidence; and the recognizance taken may be discharged or a new one taken, as the circumstances may require.

The other judges concurring, the judgment is reversed and the cause remanded.

LEE, Respondent, v. HOWE, Appellant.

1. Where there has been a part performance of a parol contract for the purchase of land, and the vendor puts it out of his power to specifically perform his contract by selling the land to a *bona fide* purchaser without notice, although there would be no remedy by action at law for damages inasmuch as the contract is by parol, equity will entertain jurisdiction of a bill for compensation.

Appeal from Jefferson Circuit Court.

The petition in this cause sets forth substantially that in the month of November or December, 1854, plaintiff purchased of one Jarvis a certain tract of land for \$550; that he gave to said Jarvis three several promissory notes, payable in March, 1855, July, 1855, and January, 1856; that Jarvis executed and gave to plaintiff an agreement in writing whereby he agreed to convey said tract to plaintiff when the latter should pay said notes; that Jarvis put plaintiff in possession of said land, and that he, plaintiff, made lasting and valuable improvements upon the same; that three or four months after said purchase, the defendant Howe, with plaintiff's consent, purchased said notes of said Jarvis, and received from the latter a conveyance of said land, upon an agreement and understanding that he was to stand in the place of said Jarvis and convey the land to plaintiff upon the payment of said notes; that before the last instalment became due defendant agreed verbally to wait another year for the purchase money; that afterwards, about the month of January, 1856, the defendant requested plaintiff to give him said agreement between plaintiff and Jarvis, promising to give him another bond; that plaintiff, relying upon the good intentions of defendant gave the bond to him, but that defendant has failed and neglected to give plaintiff another bond; that defendant, on or about April 2, 1856, sold and conveyed said land to one Vose for the price and sum of \$950. Plaintiff asks judgment for \$400, being the excess of the proceeds of said sale over and above the purchase money due and owing by plaintiff to defendant.

The cause was tried by the court without a jury, and a judgment was rendered in behalf of plaintiff for the sum of \$366.75.

Frissell and Green, for appellant.

I. A proper construction of the written contract shows a conditional sale. The contract was forfeited by a failure to

Lee v. Howe.

pay at the time stipulated. Equity will afford no relief. (2 Sto. Eq. 793, 876, 778, 1223, 781; 4 Kent, 147.) The contract being forfeited, Lee had no interest in the land, and could therefore have no interest in the money arising from the sale of it. The contract being forfeited, the vendor ceased to be a trustee of the land for the vendee. Time was material in the contract. There was no consideration for the agreement to postpone the payment for a longer time. (See 1 De Gex & Smale, 444; 1 Jac. & Walk. 419; 3 Madd. 441.)

Noell, for respondent.

I. The vendor was a trustee for the vendee as to the title to the land. The *cestui que* trust can appropriate to himself any profit which the trustee may make out of the land. Howe's retaining the notes shows clearly that there was no intention to cancel the agreement. Lee continued in possession by his agent long after Howe got hold of the agreement.

NAPTON, Judge, delivered the opinion of the court.

The sale of the land by the defendant to Vose, who appears to be a purchaser for a valuable consideration and without notice of any claim of the plaintiff, has put it entirely out of the plaintiff's power to go into a court of equity and ask for a specific performance.

As the title bond is executed by Jarvis and not by the defendant, the plaintiff can bring no action at law upon the bond for damages. There was however a parol agreement, as admitted in the answer and proved on the trial, between Jarvis, plaintiff and defendant, that the latter would convey to plaintiff upon the payment of the notes executed for the purchase money and assigned to defendant. This therefore seems to be a case in which the plaintiff may resort originally to a court of equity for compensation. (Denton v. Stewart, 1 Cond. Ch. 258; Phillips v. Thompson, 1 John. Ch. 149; Parkhurst v. Van Cortland, ib. 273.) The case of Denton v. Stewart is denied by Lord Cottenham to be law in Sains-

Lee v. Howe.

bury v. Jones, 5 Mylne & Craig, 1; but it is quoted with approbation by Chancellor Kent in the two cases cited above, and fully sustained by Judge Story in his Treatise on Equity. (2 Sto. Eq. § 798.) The principle is also fully maintained by the supreme court of Massachusetts in the more recent case of Andrews v. Brown, 3 Cush. 134. Judge Story says that courts of equity ought not to entertain bills for compensation except as incidental to other relief, but the party should be left to his remedy at law for damages. "But," he adds, "where no such remedy lies at law, there a peculiar ground for the interference of courts of equity seems to exist in order to prevent irreparable mischief, or to avoid a fraudulent advantage being taken of the injured party. Thus, where there has been a part performance of a parol contract for the purchase of lands, and the vendor has since sold the same to a *bona fide* purchaser, for a valuable consideration, without notice; in such a case, inasmuch as a decree for a specific performance would be ineffectual, and the breach of the contract, being by parol, would give no remedy at law for compensation or damages, there seems to be a just foundation for the exercise of equity jurisdiction." This case, thus hypothetically stated by Judge Story, is precisely the case now under consideration. The contract between plaintiff and defendant was a parol one, and the plaintiff could not maintain an action for damages on it at law, as the statute of frauds would prevent it. As he was in possession of the land, and had put valuable improvements on it, he could clearly enforce it in equity by a decree for a specific performance, if the defendant had not, by selling the land to a third person, put this remedy beyond his reach. The defendant must therefore be allowed to retain the profits of his speculation, which he made whilst occupying the position of a mere trustee for the plaintiff, unless the plaintiff is allowed his bill for compensation.

The title bond of Jarvis, which the defendant verbally agreed to assume, is in the ordinary form, and there is nothing in its terms to lead to an inference that payment on the

Blodgett v. Greene.

precise day specified in the notes was considered material. Had this, however, been the understanding of the parties, as is alleged in the answer, the testimony shows that payment on the day was waived by the defendant before the day when the last note fell due.

The possession of the title bond by the defendant with the plaintiff's assent would certainly go far to create an implication of an abandonment of the contract by the plaintiff, unaccompanied with any circumstances of a counteracting character. But there was evidence to show that the plaintiff had not abandoned the possession, but had a tenant on the land and had left an agent to superintend its management. Besides, the retention of the plaintiff's notes would seem to be a circumstance totally inconsistent with the idea that even the defendant considered and understood the trade to be cancelled; and this retention of the notes is also a strong circumstance to confirm the plaintiff's explanation of the manner in which and the reasons for which the title bond was delivered to the defendant. If the title bond had been given up with a view to cancel the bargain, why did the defendant retain the notes? How can such conduct be reconciled with the attempt to prove that the contract was abandoned and the bond given up? With the concurrence of the other judges, the judgment is affirmed.

BLODGETT, Respondent, v. GREENE, Appellant.

1. Where, in cases arising under the practice act of 1849, facts are set up in an answer by way of equitable defence to the action and not by way of set-off, the plaintiff is not required to reply.

Appeal from St. Louis Circuit Court.

This was an action brought in the year 1854 by Daniel Blodgett on a bill of exchange for five hundred dollars drawn by Nelson Blodgett on Cheever & Co. (of which firm defen-

dant was a member) and accepted by them. The defendant in his answer alleged that the bill sued on was the property of Nelson Blodgett and not of the plaintiff; that Nelson had endorsed it to the plaintiff in order that suit might be brought in the name of the plaintiff, against whom the defence which defendant has against Nelson Blodgett might be unavailing, and for the purpose of defrauding defendant; that Nelson Blodgett was and is indebted to the defendant in more than two thousand dollars, as shown by a judgment against him still unsatisfied in the St. Louis court of common pleas; that the bill was transferred to plaintiff long after its maturity, without consideration and upon the sole condition that Daniel should sue defendant thereon for Nelson Blodgett's use; that the bill of exchange was given in part payment of a loan which Nelson Blodgett had made of Cheever & Co. and for which he was to give them a deed of trust on real estate in Minnesota; that he did execute a deed of trust, but before it could be recorded Daniel Blodgett placed of record a deed to himself of the same land, the taking of said deed by Daniel being a contrivance to cheat Cheever & Co.; that Cheever & Co. had become liable for part of this loan to other persons to whom Nelson had given orders; that on discovering the fraud they determined to pay no more of this loan, and so refused to pay this draft or bill; that the Blodgetts are brothers and reside in Minnesota. The answer prays that said bill of exchange be ordered to be delivered up to be cancelled; that the said Nelson Blodgett and said Daniel Blodgett be ruled to answer the allegations of the answer and show cause why said bill should not be surrendered to defendant; that process be awarded to make Nelson Blodgett a party to the suit. To this answer there was no reply.

At the trial the plaintiff admitted the existence of the judgment against Nelson Blodgett as stated in the answer. The defendant moved the court to give judgment for the defendant upon the set-off in the answer. The court overruled the motion, and in its finding found that the bill sued on was drawn and accepted as stated in the petition; that at the time

Blodgett v. Greene.

of its acceptance defendant Greene was a member of the firm of Cheever & Co.; that the bill was endorsed to plaintiff; that it was duly presented and payment refused; "that plaintiff is entitled to judgment against defendant for the amount of said bill, together with damages on the principal sum specified therein at the rate of ten per cent, &c. No other facts."

Gantt, for appellant.

Knox & Kellogg, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The defendant can not complain that the court did not give judgment on the matter set up by him in his answer for want of a reply. The matter relied on as a set-off was not pleaded as such, but was stated as an equitable answer; and the prayer was appropriate to such a defence. The matter not having been set up as a set-off, it would operate as a surprise on the plaintiff to hold that it was admitted, because there was no reply to it. No doubt but that out of the facts stated in the answer the defence of a set-off might have been framed, but the defendant using it in another way and concluding his answer with a prayer appropriate to such a use, he can not complain that a portion of his answer was not treated as a claim to a set-off. At the time of the beginning of this suit there was no statute allowing the defendant to set up a counter claim to the plaintiff's demand. Unless the counter claim consisted of a set-off which could be pleaded to an action for money, it could not be pleaded. Of course the defendant could make any equitable defence, but that did not require a reply. The defence in this case being an equitable one, and not an answer setting up a set-off, did not require a reply.

It is averred in the petition and is not denied in the answer that the plaintiff was the holder of the bill. Whether he was a *bona fide* holder was a fact submitted to the court, and it was found that the plaintiff was the legal holder of the bill. There is nothing in the finding of the facts which

Manny v. Logan.

should induce this court to disturb the judgment, especially when the evidence for the defendant is taken into consideration. After stating the facts on which the judgment is founded, the finding proceeds, "no other facts;" when the record is looked into, this phrase is sufficiently significant.

Under our statute the holder of the bill was allowed ten per cent. damages, as it was drawn at a place without this state and within the United States.

The other judges concurring, the judgment will be affirmed.



MANNY *et al.*, Plaintiffs in Error, v. LOGAN, ASSIGNEE, Defendant in Error.

1. The term "voluntary," as applied to conveyances within the act concerning voluntary assignments (R. C. 1852, p. 202), means *voluntary* as opposed to *compulsory*; a conveyance to a creditor in trust for himself as well as the other creditors of the assignor is a voluntary assignment within the meaning of said act.

Error to Marion Circuit Court.

On the 30th of January, 1858, one Samuel W. Riggs, being largely indebted, executed a deed of trust of certain described real and personal property to one Logan as trustee. Certain debts of said Riggs to various parties, among others to Logan, the trustee, were recited in this deed, and the trustee was directed therein to pay said debts in their order, and when all said specified debts were paid to hold the residue of the proceeds for the benefit of all the creditors of the assignor, to be apportioned *pro rata* among them. The present proceeding is an application, under section 26 of the act concerning voluntary assignments, on behalf of certain creditors of said Riggs, for a citation directed to said assignee to appear and show cause why he should not file an inventory and give bond, &c., or be dismissed from his trust. A citation issued. The assignee answered admitting his acceptance of

Manny v. Logan.

the trust and that he had not filed an inventory, but denied that he was bound to do so. The court dismissed the proceeding on the ground that the conveyance was not a *voluntary* assignment within the meaning of the act concerning voluntary assignments, and refused to require Logan to file an inventory. The plaintiffs were not named as creditors in the assignment.

Dryden, Lipscomb and Porter & Harrison, for plaintiffs in error.

I. The deed from Riggs to Logan was a "voluntary assignment" in the sense of the first section of the act concerning voluntary assignments. (See Burrill on Assign. 5; 10 Paige, 461; 3 Sumn. 345; 26 Mo. 322.)

Pratt and McCabe, for defendant in error.

I. This was not an assignment for the benefit of creditors in the general. The creditors whose debts are secured by it are those named in the deed. The plaintiffs in the present proceedings are not named therein. It was not a *voluntary* assignment within the act concerning voluntary assignments. Logan was a creditor and his debt was secured.

NAPTON, Judge, delivered the opinion of the court.

This was an application by the plaintiffs, claiming to be creditors of one Riggs—who had assigned his goods and lands to Logan for the benefit of certain creditors named, and afterwards for the benefit of creditors generally—to compel the trustee Logan to proceed under our statute, file his inventory, give bond, &c. The claim was resisted on the ground that the assignment was *for value*, and not therefore a voluntary one under our statute, and that Logan, the assignee, was one of the creditors.

The assignment is unquestionably within the provisions of our statute. It is for the benefit of all the assignor's creditors, though an attempt is made to classify and give preferences to some. All assignments of this character which have

Barron v. Alexander.

any validity as against creditors not named, if there are any such, must be founded on a valuable consideration; but if the creditors named are *bona fide*, that is sufficient to support the instrument. (19 Mo. 17.) Whatever may be the proper meaning of the term *voluntary* used in our statute, it certainly was not intended to exclude from the operation of the law all assignments which were founded on a valuable consideration. The term is probably borrowed from the English books, where assignments in bankruptcy were sometimes created by operation of the law. The fact that Logan, the trustee, is a creditor does not take the assignment out of the statute. The only effect it could have would be to authorize the court to appoint another trustee. The other judges concurring, judgment reversed and cause remanded.

SCOTT, Judge. I concur in reversing the judgment. The term "voluntary" is applied to assignments to distinguish them from such as are made by the compulsion of the law, as under statutes of bankruptcy and insolvency, or by order of some competent court. (Burrill on Assignments, 5.)

BARRON, Appellant, v. ALEXANDER, Respondent.

1. Where a vendor knows the existence of a latent defect in an article sold by him, and sells the same for a sound price without disclosing the defect to the vendee, he is guilty of a fraud; such fraud may be set up as a defence to an action founded on a note given for the price of the article sold; it is not necessary that there should be any express warranty or representation as to the quality of the article sold.

Appeal from Franklin Circuit Court.

Holmes and Romyne, for appellant.

C. Jones, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The defendant sets up in his answer to the plaintiff's petition, which is founded on a note given for the price of a slave,

Yates v. Brackenridge.

that at the time of the sale the slave was diseased, which was known to the plaintiff and which he fraudulently concealed from him.

Where a vendor sells a defective article, knowing the existence of the defect, for a sound price, and does not disclose it to his vendee, he is guilty of a fraud, and such fraud may be set up as a defence to an action founded on a note given for the price of the article. In such case it is not necessary to the defence that there should be any warranty or representation as to the quality of the goods. The rule *suppressio veri est suggestio falsi* applies. Knowingly to conceal a defect in goods when selling them for a sound price is a gross fraud. This principle is well settled and has heretofore been recognized and acted upon in our courts. (McAdams v. Cates, 24 Mo. 223.) There was no error in the court's instructions on this subject.

The affidavit as to the misconduct of a juror was entirely too vague and indefinite to found any action of the court upon it. The other judges concurring, the judgment will be affirmed.

YATES, Respondent, v. BRACKENRIDGE, Appellant.

1. Where there is any testimony which tends to support any of the issues in a cause, it is error to instruct the jury that there is no evidence before them.

Appeal from St. Louis Court of Common Pleas.

Breckenridge & Page, for appellant.

Gantt, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

We think that the evidence offered by the defendant tended to show the truth of the answer as to a partial failure, and the circumstances that led to the execution of the note; and

Gibson v. Lewis.

the instruction was therefore erroneous that declared there was no evidence on the subject. (Rippey v. Friede, 26 Mo. 523.) A party resisting the payment of a note on the ground that it was obtained by fraud or without consideration is not bound to show what occurred at the time of its execution by a witness who was present, but in the absence of more direct proof may establish his defence by circumstances.

The other judges concurring, the judgment will be reversed and the cause remanded.

GIBSON *et al.*, Respondents, v. LEWIS, Appellant.

1. In an action of forcible entry and detainer the jury returned the following verdict: "We, the jury, find the defendants guilty in manner and form as charged in plaintiffs' complaint; and that they took possession of the premises the 15th of November, 1854; and that they have and recover of and from the defendants damages at the rate of \$2.16½ per month for the unlawful detention of said premises." *Held*, that this verdict, though informal, was sufficient to authorize thereon a judgment for restitution of the premises, and for an amount as damages equal to double the gross amount of the rents and profits at the rate of \$2.16½ per month up to the time of trial.

Appeal from Butler Circuit Court.

Noell, for appellants.

I. The verdict was legally insufficient to warrant the judgment. The judgment should have been arrested.

Bland & Coleman, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

This was an action of forcible entry and detainer, and on the trial in the circuit court the verdict was as follows: "We, the jury, find the defendants guilty in manner and form as charged in plaintiffs' complaint, and that they took possession of the premises the 15th of November, 1854; and that they have and recover of and from the defendants damages at the

rate of \$2.16½ per month for the unlawful detention of said premises." The verdict is informal, but it is evident that the jury found the defendants guilty of a forcible entry on the 15th of November, 1854; that the premises had since then been detained, and that the plaintiffs ought to recover damages at the rate of \$2.16½ per month since the forcible entry. On this verdict the court rendered judgment of restitution and that the plaintiffs recover as damages \$169.52, but no sum was named as the monthly rents and profits to accrue from the day of the verdict until restitution should be made.

The defendants made a motion in arrest of judgment, which was overruled; and the only question here is whether the verdict will support the judgment.

Questions like this one ought never to arise, because they are so easily avoided. The court had authority to correct the verdict in matters of form in presence of the jury; and, besides, the statute not only describes all the elements of a verdict in an action like this, but furnishes two forms—one to be used in the event that the jury find for the plaintiff, and the other in the event they find for the defendant; (R. C. 1855, p. 790, § 18, 19;) and, in a case where the verdict must be different from the usual form, both forms as given by the statute could be handed to the jury—one to be signed after filling the necessary blanks if they find for the plaintiff, and the other to be returned if they find for the defendant. The seventeenth section provides that in all cases of a verdict for the complainant, damages shall be assessed as well for waste and injury committed upon the premises, as for rents and profits due and owing up to the time of finding the verdict, and the verdict shall also contain a finding of the monthly value of the rents and profits of the premises. After judgment the plaintiff may be delayed by the defendant in getting possession, and the object of the last clause of the section is to fix a sum, which is doubled by the court, that the plaintiff will be entitled to receive, in addition to the damages, to cover the time he is kept out of possession from the day of the verdict until restitution is made. The sum

found as the aggregate of the damages will include the damages for waste and injury, and also for rents and profits from the time of the entry to the trial; but the jury may not find that any waste and injury have been committed, and in that case the damages will only be for the rents and profits. The jury in this case did not find any damages on account of waste, but found that the plaintiff was entitled to recover rents and profits from November 15, 1854, to the time of the trial in May, 1858, (three years and five months and a half,) at the rate of \$2.16½ per month, which produces the sum of \$89.84; and though the verdict is informal in omitting to state the result, it can be ascertained and rendered certain by a simple operation in arithmetic. The law directs that judgment shall be given for double the sum assessed by the jury, and it will be observed that the judgment on this verdict is for a less sum than the plaintiff was entitled to.

The judgment does not declare the monthly rents to which the plaintiff would be entitled from the time of the verdict until restitution of the premises, and the plaintiff will therefore lose the right to demand any rents since the trial, and can only receive on the execution restitution and the damages with interest; but the defendant gains by this omission and can not complain of it.

The complaint filed before the justice is set out twice in the record. In one place the forcible entry is stated to have been on the 6th December, 1853, and in the other on the 6th December, 1854; but the year is immaterial; and admitting that the plaintiff could only recover the rents from 6th December instead of 15th November, the judgment is still for less than double the amount the plaintiff was entitled to, counting from the 6th of December.

The other judges concurring, the judgment will be affirmed.

State v. Fugate.

THE STATE, Defendant in Error, v. FUGATE, Plaintiff in Error.

1. The law presumes the innocence, not the guilt, of an accused person ; it is error to instruct a jury that in order to find a verdict of guilty it is not necessary that they should be satisfied of the defendant's guilt to the exclusion of a reasonable doubt, but that if they believe from the evidence that the defendant is guilty they should so find, although they may entertain a reasonable doubt.

Error to Shelby Circuit Court.

This was a prosecution for an assault upon one Margaret D. McGee. The court instructed the jury as follows: "1. If the jury find from the evidence in the case that the defendant laid hands on Mrs. McGee and kissed her without her consent, they will find him guilty and assess a fine against him not exceeding one hundred dollars and not less than one dollar. 2. In order to find a verdict in this case, it is not necessary that the jury should be satisfied of defendant's guilt to the exclusion of a reasonable doubt ; but if the jury believe from the evidence that the defendant is guilty of the charge against him, they should so find, although they may entertain a reasonable doubt."

The jury returned a verdict of guilty, and assessed the fine at one hundred dollars.

Carr, for plaintiff in error.

Howell, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

The first instruction given for the State in this case is correct, but the instructions which follow, if they are not misunderstood, conflict with established rules of evidence, and, indeed, with natural justice. The jury are told that it was not necessary for them to be satisfied of the guilt of the defendant beyond a reasonable doubt, in order to justify a ver-

Cayton v. Hardy.

dict against him; but if they believed from the evidence that the defendant was guilty, they would so find, although they might entertain a reasonable doubt.

What degree of faith the court might think to be consistent with reasonable doubts is not explained, and the propositions might need some metaphysical ingenuity to reconcile, but, if the instruction is capable of explanation at all, it must be understood to give the State the benefit of all doubts, and raise the presumption of guilt against the defendant until it was removed by satisfactory evidence to the contrary. This is not the law even in civil cases, but it is just the reverse. When a plaintiff charges that a defendant owes him a hundred dollars, he must prove it, and if he leaves it in doubt whether the debt be due or not, the defendant is to have the benefit of such doubt; and the law in cases of doubt leaves the parties where it finds them. If the debt is admitted and payment is pleaded, the payment must be shown, as the presumption will be that the debt continues until the contrary appears. So the law in criminal trials presumes a man's innocence until the contrary appears, and does not presume his guilt until he shows his innocence. These are truisms, but they seem to be overturned by the instructions reported to have been given in this case.

The other judges concurring, the judgment is reversed and the cause remanded.



CAYTON, Plaintiff in Error, v. HARDY, Defendant in Error.

1. Acts of a partner wholly outside the scope of the partnership business and known to be so by the person dealing with such partner are not binding upon the other partner.
2. In determining whether particular acts of a partner are within the scope of the partnership business and binding upon all the partners, if the partnership articles are not decisive of this question, the previous dealings and acts of the partners or of any of them, the length of time these acts have continued, &c., may be considered.

Cayton v. Hardy.

Error to Ralls Circuit Court.

This was an action to recover possession of two yoke of oxen. It appeared in evidence that said oxen were a portion of the stock of a farm held and leased by the plaintiff. The defence relied on was that said stock was owned by said plaintiff Cayton and one Robertson as partners, and that Robertson sold said oxen to defendant. The defendant introduced in evidence the following agreement: "Francis M. Cayton, the party of the first part, agrees to furnish a tract of land large enough to make a good stock farm; also agrees to furnish farming utensils sufficient for use of said farm; and also agrees to furnish four brood mares or more as he may choose, and one hundred (more or less) stock cattle; and also agrees to furnish one hand to work on said farm. And the party of the second part agrees to take charge of said farm and stock, and work and pay strict attention to the same; also agrees to improve said land sufficient for all the stock that may be on it, at the expense of each party; and for such services the party of the first part agrees to give the party of the second part one-third of the proceeds of the farm and stock after replacing all the stock put on the farm in the first place. The parties are to live on the farm. This copartnership to last five years, unless one of the parties becomes dissatisfied. Witness our hands and seals. [Signed] Francis M. Cayton (seal). David C. Robertson (seal)."

The two yoke of oxen in controversy composed a portion of the stock of the said farm furnished by said Cayton. They were sold by Robertson to the defendant at the price of forty dollars per yoke. This price was paid. The court, at the instance of the defendant, instructed the jury as follows: "The written instrument read in evidence and signed by Francis M. Cayton and David C. Robertson constituted Cayton and Robertson partners as to third persons of the cattle and stock and proceeds of the farm named in said written instrument; and if the jury believe from the evidence that Robertson sold the cattle in controversy to the defendant, and

Cayton v. Hardy.

that they were when so sold a part of the stock named in the said writing, such sale to Hardy by Robertson was good in law to divest the title of Cayton, and the verdict should be for defendant, unless the jury should further find from the evidence that said Robertson sold said stock with the intent to defraud the plaintiff, his copartner, and that defendant purchased with notice of such intent."

The plaintiff took a nonsuit, with leave, &c.

Porter & Harrison and *McCabe*, for plaintiff in error.

I. The court erred in instructing the jury that the instrument of writing read in evidence constituted Cayton and Robertson partners. It did not constitute them partners either *inter sese* or as to third persons. (Colly. on Part. 14, 19; 4 East, 144; 3 Wils. 40; 15 Mo. 481; 15 S. & R. 137; 17 Mass. 197; 14 Pick. 192; 12 Conn. 69; 18 Wend. 175; 20 Wend. 70; 17 Ves. 404; 4 B. & Cr. 867; 1 Rose, 191; 18 Wend. 184; 6 Metc. 82; 6 Halst. 181; 15 Ills. 31; 4 Paige, 148.)

Lamb & Lakenan, for defendant in error.

I. Cayton and Robertson were clearly partners both as between themselves and as to third persons. Each party had the power to dispose of the stock of the farm aside from the power he would have as partner. The agreement clearly contemplates sales of the stock and proceeds.

NAPTON, Judge, delivered the opinion of the court.

The instruction of the court in this case declared the articles of agreement produced in evidence to constitute a partnership between Cayton and Robertson, as to third persons, of the cattle and stock and proceeds of the farm, and that the sale to defendant was valid, unless the jury believed there was fraud on the part of Robertson, and that the defendant knew of and participated in the fraud.

That the written instrument executed by Cayton and Hardy constituted a partnership between them is by no means

Cayton v. Hardy.

clear. The intention would rather seem to be to constitute a mere agency in Robertson, with a compensation for his labor and services in a sum proportioned to the profits. (*Pennie v. Hankinson*, 6 Hals. 181.) But the parties themselves call it a partnership, and as Robertson was to share the *nett* profits and not the *gross* profits, the court may have been right in declaring them partners upon the authority of *Dry v. Boswell*, 1 Camp. 329; and at all events partners as to third persons. (Story on Part. § 60; *Chase v. Barrett*, 4 Paige, 148; *Grace v. Smith*, 2 Black. 988.) The subject is one upon which the distinctions are very refined, and we are not satisfied that the instruction was wrong in this particular. Nor does the question seem very material; for, whether there was a partnership or a mere agency, the question still remains whether the sale was authorized either by one species of agency or another.

Each partner has undoubtedly full power to dispose of the entire right of all the partners for the purposes of the partnership and in the name of the firm. Unless the contract provides otherwise, the partners are joint owners of all the capital stock, funds and effects belonging to the partnership, and each partner may dispose of his capital or fund for purposes *within the scope of the partnership*. Chancellor Kent says that "in ordinary cases, and in the absence of fraud on the part of the purchaser, each partner has the complete *jus disponendi* of the whole partnership interest." But in every contract of this sort it is manifest that we must look to the scope of the partnership business to see whether the partner is violating his obligations, and whether the purchaser was likely to be innocently misled. The following observations of Judge Story, in this connexion, are so pertinent and just that we transcribe them: "The real difficulty," says Judge Story, "in many of these cases (speaking of engagements which ought to bind the partnership) is to ascertain what contracts, engagements and acts are properly to be deemed within the scope of the particular partnership, trade, or business; for these are not exactly the same in all sorts of trade

or business. On the contrary, in many cases, rights, powers and authorities over partnership property and partnership concerns exist by usage, or by general understanding, or by natural implication, which are wholly unknown in others. To answer the inquiry, it is not enough to show that in other trades or other business, certain rights, powers and authorities are incident thereto and may be lawfully exercised by such of the partners, but we must see that they appropriately belong to or are by usage or otherwise implied or incidental to the particular trade or business in which the partnership is engaged." (Story on Part. § 173.)

It is manifest that the agreement in this case, whether regarded as constituting a copartnership or an agency, did not confer on Robertson any power or authority to sell the farm, the brood mares, the stock cattle, or the farming utensils; that the sale of these things was not within the scope of the business; and that the anticipated profits were not expected to be created by such sales at all, but from the *proceeds* of the farm, farming implements, stock, &c., in the shape of grain, fatted cattle, or other produce. That Robertson had no authority to sell the work oxen derived from the agreement is clear; and, if the agreement constituted a partnership, neither had Cayton. Such sales were not the business contemplated. This consideration alone does not however make the defendant liable; for, if he had reason to believe from the ordinary course of their dealings that such authority did exist, he ought not to bear the loss. The question therefore ought to be put to the jury, not merely whether this sale was a fraud upon the part of Robertson and made with the knowledge and participation of Hardy, but whether it was wholly outside of the scope of the partnership business, not merely as indicated by the articles of agreement, of which the public could be presumed to have no notice, but as determined by the conduct of the parties to it in dealing with their neighbors. If it was, that circumstance ought at least to have put the purchaser upon inquiry. The previous dealings and acts of Robertson and Cayton, or of either, the

Gillett v. Camp.

length of time these acts had continued, the price at which the cattle sold, are all circumstances which may be given in evidence, and may show, and would no doubt satisfactorily show, upon whom this loss should fall. The nonsuit will be set aside and the case remanded for trial.

Judgment reversed and cause remanded; Judge Richardson concurring. Judge Scott absent, through indisposition.

GILLETT, Appellant, v. CAMP & WIFE, Respondent.

1. At law there will be no implication of a promise on the part of a step-daughter to pay her step-father for necessities furnished by the latter during the minority of the former.

Appeal from Warren Circuit Court.

This was an action by Philo Gillett against Beverly Camp and Elvira Camp, his wife, to recover compensation for money paid and expenses incurred by him in the education and maintenance, before her marriage, of the defendant Mrs. Camp. At the close of the evidence, the court at the instance of the defendants gave the following instructions: "1. If the jury believe that the plaintiff intermarried with the mother of Elvira Camp, and that she, being of tender years, was taken into the family of plaintiff and remained a member thereof from the time of said marriage up to the death of her mother in 1847, and that the plaintiff during said marriage maintained and supported the said Elvira, the law will not imply a promise on the part of the said Elvira or her husband to pay for said maintenance, and the plaintiff can not recover for such maintenance unless an express promise of payment has been proved to pay the same. 2. If the jury find that, after the death of the mother of the said Elvira Camp, the plaintiff was appointed guardian of the said Elvira in the territory of Wisconsin, where the said Elvira resided, and that he so continued to act as her guardian by

virtue of his appointment aforesaid, and while as such guardian he expended money for the necessary support, maintenance and education of said Elvira, these expenditures can not be taken into consideration by the jury, nor can they give a verdict therefor unless the jury find that the said Elvira or her husband have undertaken and agreed to pay the same; these expenditures as between guardian and ward not creating a personal obligation on the part of the ward, and being alone chargeable against any funds coming into his hands belonging to said ward."

The plaintiff took a nonsuit with leave, &c.

S. T. & A. D. Glover, for appellant.

I. The court erred in giving the instructions asked by defendants. (3 Edw. Ch. 40; 9 Ala. 615; 2 Kent, 190; 2 Ashm. 332; 1 Kelly, 475; 1 Taml. 72.)

Wells, for respondents.

I. The law will not imply a promise to pay the step-child for his services; nor will it imply a promise on the part of the child to pay for board, schooling, &c., when the child remains a member of the family of the step-father. (See 22 Mo. 439.)

Scott, Judge, delivered the opinion of the court.

This is a suit by a step-father for the expenses incurred in supporting and educating his wife's child by a former husband. The old notion in England was, that, inasmuch as the widowed mother was bound to support her minor children, a man by marrying her assumed that with all her other obligations, and made himself liable for the support of her children by a former husband. There was no hardship in this, as at common law by the marriage all the wife's goods became the property of her husband and he was entitled to all her earnings. Afterwards, the case of *Tubb v. Harrison*, 4 Term R. 118, determined that the step-father was not bound for the support and maintenance of his wife's children

Gillett v. Camp.

by a former husband. If he adopted them into his family and treated them as his children, he would be bound for necessities furnished them. By a late statute in England (4 & 5 Will. IV) it is enacted that every man who shall marry a woman having a child or children at the time of such marriage, whether legitimate or illegitimate, shall be liable to maintain such child or children as part of his family, until they respectively attain the age of sixteen, or until the death of the mother of such child or children.

This is no case in which the question arises as to the circumstances under which a court would order the child's income to be applied to its support, nor is it an application to appropriate a portion of a child's estate to its support. There is here no fund under the control of any court to be applied in its discretion to the maintenance of infants, but this is an action at law in which the plaintiff must stand upon his legal rights. The doctrine of the courts of equity, in making appropriations in favor of the parents for the support of minor children when they have such an estate as will sanction such a proceeding, has nothing to do with this case. That such allowances are made gives no countenance to this action. Every one must see the danger to which the estates of minor children must be exposed, if step-fathers were permitted to recover from them, after they attain their majority, any account which they might make out against them for maintenance and support during their minority without the sanction of any court. He would make himself the judge of what is necessary, and without regard to the minor's estate would run it in debt to an amount exceeding its value, and then would make the husband of a female minor liable for necessities furnished her during infancy. So far as we can learn, the utmost length to which courts of law have gone in upholding claims of step-fathers against minor children by a former husband is to declare that if the second husband maintains such children, it is a good consideration for a promise by them when they come of age to repay the expense of their maintenance, especially when the second husband

Madden's Heirs v. Madden's Adm'r & Heirs.

was a man of small substance and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to chancery for an allowance out of the fund, as he might have done. (Cooper v. Martin, 4 East, 76.)

The fact that the plaintiff stood in the nominal relation of guardian to the wife of the defendant Camp can not better his condition. His accounts as guardian should be settled in the proper court; and if nothing belonging to the ward has ever come to his hands as guardian, out of which he can retain enough for his indemnity, his claim does not thereby become the foundation of an action at law, for it was his wrong and folly to be contracting debts on account of his ward when he knew there was nothing in his hands to satisfy them. If the estate of the ward was in the hands of a curator distinct from the guardian of the person, then the application for allowances should have been made to the court having the control of the curator.

Judge Napton concurring, the judgment will be affirmed. Judge Richardson not sitting, having been of counsel.

MADDEN'S HEIRS, Appellants, v. MADDEN'S ADMINISTRATOR
AND HEIRS, Respondents.

1. By the rules of chancery practice in force prior to the passage of the practice act of 1848, bills of exceptions were as necessary as in common law suits.
2. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course.

Appeal from Washington Circuit Court.

This was a bill in chancery filed March 11, 1847, by certain of the heirs of Tomas Madden, senior, deceased, against certain other of the heirs of said Madden and his administra-

Madden's Heirs v. Madden's Adm'r & Heirs.

tor. The object of the bill was to bring all the heirs into hotchpot, to obtain a settlement of the accounts of the administrator, a sale of the lands of the intestate, and an equalization of the heirs in the distribution of the estate. The facts being exceedingly complicated, it is deemed unnecessary to state them. The ground of the decision sufficiently appears in the opinion of the court. Both plaintiffs and defendants appeal.

Frissell, for appellants.

I. The court erred in dismissing the supplemental bill.

II. Interest was erroneously charged against the administrator.

T. C. Johnson, for respondents.

I. If any error was committed in the matter charging the administrator with interest upon moneys received by him, the error was in his favor and not to his prejudice. (*Duncomb v. Duncomb*, 1 Johns. Ch. 509 ; *id.* 533, 618 ; *Strong v. Wilkerson*, 14 Mo. 116.) The court committed no error in refusing leave to file a supplemental bill.

SCOTT, Judge, delivered the opinion of the court.

This case was a suit in chancery commenced in 1847, under the old practice. Under that practice, bills of exceptions were as necessary in chancery as in common law suits. The accounts settled by the court or by a commissioner appointed by the court could only be reviewed here on objections and exceptions to the opinions of the court. When an account was settled by a commissioner, exceptions were taken, and they were stated in the report together with the evidence and reported to the court, who decided the points raised before the commissioner if they were renewed, and on that decision an exception was taken as in all other cases. There is nothing in this record but the final decree which can be reviewed by this court. The calculations and evidence on which that decree is based not being preserved, there are no means of ascertaining its correctness.

Madden's Heirs v. Madden's Adm'r & Heirs.

Surely the case of *Strong v. Wilson*, 14 Mo. 116, did not intend to introduce any new method of settling administrator's accounts. Whether an administrator is to be charged with interest on the money in his hands belonging to an estate is a question to be determined by the circumstances of each case as it arises. He is not to be charged with interest on money in his hands as a matter of course. On the final settlement, or before if required to do so, the court will determine whether an administrator is properly chargeable with interest. To charge him in all cases with interest on money in his hands without regard to circumstances would be monstrous injustice. The money due on a note bearing interest, when collected, would of course cease to bear interest. But by maladministration the administrator might make himself liable for interest on that as well as for any other money in his hands. Debtors of the estate would be chargeable with interest until their debts were paid, and the administrator on collecting them would charge himself with the amount and interest would cease. If a distributee of a solvent estate owed it a bond bearing interest, whether the distributee would be charged with interest might depend on circumstances, but that is not a question for the administrator to determine. In collecting such a bond, he could only be guided by the face of it.

There was no error in the court's refusal to permit Frisell to file what is termed a supplemental bill for the partition and sale of lands in Ralls county, which were a part of Madden's estate. We do not see the principle on which the bill is founded. Besides, the bill professes ignorance of the state of the title and of the quantity of the land sought to be sold and divided. It seems Madden held an undivided interest in a tract of land situated in Ralls county, which was confirmed by the act of Congress of July 4th, 1836. Most of the land had been sold by the United States before the confirmation, and certificates of new location have issued, but it is said they have not been delivered. The quantity of the land sold by the United States has not been ascertained. As

Perkins v. Woods.

the certificate or certificates of new location have not been delivered, how is it possible to get along with such a case?

The other judges concurring, the judgment will be affirmed.

PERKINS, Plaintiff in Error, v. WOODS *et al.*, Defendants in Error.

1. In proceedings instituted under the revised code of 1845 to foreclose a mortgage, the administrator of the mortgagor was the only necessary party; his heirs were not necessary parties.

Error to Lincoln Circuit Court.

W. Porter, for plaintiff in error.

I. The heir was a necessary party. The foreclosure in no way affected the right of the heir to redeem. The demurrer was improperly sustained. (7 Mo. 374; 1 Powell on Mortg. 282; 7 Cranch, 69; 2 Gallis. 371; 2 Mason, 181; 11 Wheat. 103; *id.* 304; 1 Stark. on Ev. 191; 2 N. H. 190; 1 Wheat. 6; 1 Munf. 373; 2 H. & Munf. 139; 14 Johns. 79; 4 Day, 431; 2 Sto. Eq. § 1026; 2 Hare, 237; 1 Black. Comm. 89, 90.) The present case can be distinguished from that of *McCord's Adm'r v. Riley's Adm'r*, 21 Mo. 285.

S. T. & A. D. Glorer, for defendants in error.

I. The heir of the mortgagor was not a necessary party. (1 Mo. 691; 16 Mo. 85; R. C. 1845, p. 750; *Miles v. Smith*, 22 Mo. 499; *McCord's Adm'r v. Riley's Adm'r*, 21 Mo. 285.)

NAPTON, Judge, delivered the opinion of the court.

This was a proceeding by the heir of a mortgagor to redeem the land mortgaged. A foreclosure had been obtained in a suit by the mortgagee against the administrator of the mortgagor; and the plaintiff, not having been a party to that proceeding, claims that her interest was not sold. A demurrer was filed and sustained, and the only question is whether

Perkins v. Woods.

the heir is a necessary party to a foreclosure of a mortgage. The point was expressly decided in *Riley's Adm'r v. McCord's Adm'r*, 21 Mo. 285. Before the revised code of 1845, a mortgage could not be foreclosed without making the heirs of the mortgagor parties. The fourth section of the act of 1845 says that where the mortgagor is dead, his administrator shall be made a party. The seventeenth section says that the judgment in such event shall be for the debt and damages and costs, to be levied on the mortgaged property, and, if that is insufficient, it shall have the effect of a general judgment against the administrator. The object of the statute is to facilitate the foreclosure of mortgages in case of the death of either party, and the act can admit of no other construction than that, where the administrator is a party, the land mortgaged may be levied on under the judgment of foreclosure and sold. But if the law is to be held to have left it still essential to make the heir a party in order to affect his interest, the statute is only calculated to entrap purchasers; for as the administrator has no interest in the land, a sale of his interest amounts to nothing. If any thing in the way of substantial protection to the rights of minors could be gained by the restricted interpretation of the act contended for in this case, it would certainly afford good reason for hesitation in adhering to the construction which has already been adopted by the court and which the more obvious meaning of the statute appears to require. But we can see no ground for entertaining such an opinion. The administrator is more likely to be in possession of any information, which would produce a defence, than the heir. It is a mere question of the form of a proceeding, and if any other parties are declared necessary than those expressly stated by the statute, great inconveniences and much injustice may be expected, greater probably than would result from an adherence to the construction given years ago.

The judgment is affirmed; Judge Scott concurring. Judge Richardson not sitting, having been of counsel.

Ross v. Clark.

Ross, Defendant in Error, v. CLARK *et al.*, Plaintiffs in Error.

1. To authorize the lender of a chattel to recover its value of the borrower, it must appear that it has been lost or destroyed through the negligence of the latter or has been converted to his use; there can be no recovery as for a conversion of the chattel, where the evidence merely shows that there was a loan and a failure on the part of the borrower to return the thing borrowed; a demand must be shown.

Error to Ralls Circuit Court.

The following is the instruction referred to in the opinion of the court: "The court instructs the jury that if the jury believe from the evidence and circumstances proved in the cause that the defendant David Clark authorized his son James Clark to borrow plaintiff's bull for him the said David, and that the said James as agent of the said David did borrow said bull from plaintiff for his father, the law implies a contract upon the part of the said defendant David Clark to return said bull within a reasonable time, and the jury ought to find a verdict for plaintiff against said David, unless they further find from the evidence that said David did return said bull to plaintiff within a reasonable time after said borrowing." The court also refused the following instruction asked by the defendants: "Unless the jury find that the plaintiff, before this suit was instituted made a demand on the defendants for the return of the bull and defendants refused or neglected to return said bull, plaintiff can not recover, and the jury will find for defendant." The jury found the plaintiff "entitled to the sum of twelve dollars for the bull, to be paid for by David Clark, who borrowed said animal."

Porter & Harrison and Wellman, for plaintiffs in error.

I. There was no proof tending to show any actual conversion of the property loaned; a demand and refusal were necessary to make out a *prima facie* case. The instruction given was erroneous. The court also erred in refusing the instruction asked by defendants. (2 Greenl. on Ev. § 644.)

Southworth & Lancaster, for defendant in error.

I. The instruction given by the court contained no error. The instruction asked by defendants was properly refused. (Story on Bailm. § 257.)

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff sued the defendant for the value of a bull alleged to have been loaned to the defendant and not returned. It may be inferred from the bill of exceptions that the defendant borrowed a bull belonging to the plaintiff, which has not been returned; but it does not appear when the bailment was made, nor that the time has expired for which it was made, nor whether a demand was ever made, nor whether the animal was dead or lost, or had ever been claimed or converted by the defendant.

In the case of a gratuitous loan, the borrower is bound to take proper care of the thing borrowed, and to restore it at the proper time; and if no particular time is agreed on, it is his duty to return it in reasonable time; and, as the loan is exclusively for his benefit, he is bound to extraordinary diligence and is responsible for slight neglect in relation to the thing loaned. But the lender can not at his pleasure convert a loan into a sale without showing any thing more; and, to authorize him to recover the value of the thing loaned, it must appear that it has been lost or destroyed by the borrower's negligence, or that he has converted it to his own use. Where however a demand is made, the party must return the property or give some account how it is lost. (When the circumstances show a loss by the defendant's negligence or establish a conversion, a demand is not necessary, but generally when the defendant in the first instance became lawfully possessed of the goods and the plaintiff does not show an actual conversion or assumption of property by the defendant, he must prove a demand and refusal. (2 Saund. 1160; 1 Chitt. Pl. 180.) If the borrower fails in his duty to return the thing loaned in a reasonable time, that fact by itself will

Rice v. Underwood.

not entitle the lender to recover its value in money. The second instruction therefore given by the court was erroneous.

Judge Napton concurring, the judgment will be reversed and the cause remanded. Judge Scott not sitting.

RICE, Plaintiff in Error, v. UNDERWOOD, Defendant in Error.

1. Where cattle are taken up and posted as strays, and the owner, within a year from the date of such taking up, forcibly takes possession of them, he must pay the legal charges of the one who took them up as strays.

Appeal from Ralls Circuit Court.

This action was originally commenced before a justice of the peace. The account filed with the justice contained items for costs paid and expenses, &c., incurred in taking up and posting as strays a lot of mules. On appeal to the circuit court, the cause was submitted to the court on the following agreed statement of the facts: "The account filed by the plaintiff is for fees paid officers for posting the animals of defendant as alleged, and for trouble and expenses in keeping them. There has been no express agreement by the defendant to pay said fees and expenses. Defendant forcibly took said animals out of plaintiff's enclosure." The court, at the instance of the defendant, gave the following declaration of the law: "From the statement of facts as agreed upon by the parties, no promise on the part of defendant to pay the costs of taking up the animals as strays or to pay expenses of keeping said animals can be implied." The court found for the defendant.

Lancaster and Anderson, for plaintiff in error.

I. The instruction given was erroneous.

Broadhead, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

The agreed facts do not show whether the animals were strays, subject to be taken up, nor when they were taken up,

American Iron Mountain Co. v. Evans.

nor when they were posted, nor what sum the plaintiff paid for that purpose ; but, assuming, as the counsel have in their briefs, that the mules were taken up as strays and that the plaintiff performed his duty as required by the statute, enough is shown to raise a proposition of law. If the plaintiff had complied with the stray law (R. C. 1845, p. 1038), the title to the mules would have vested in him after the expiration of one year ; and, if within one year the defendant had claimed them and proved his right, he would only have been entitled to take them upon payment of "all costs, the reward and a reasonable allowance for keeping them." The plaintiff had a lien on the mules for whatever was due to him, and though he had no right of reclamation against the defendant if he chose to abandon his property, he had the right of possession until he was paid. By taking the property the defendant admitted that it was worth more than the plaintiff's legal charges on it, and he could not by committing a trespass avoid the liability to pay the just demands against it. The law implied an obligation on the defendant, if he took the mules within one year from the time they were taken up, to pay "all costs, the reward and a reasonable allowance for taking the same," and the plaintiff was entitled to recover his legal charges.

The instruction was erroneous, and the judgment will be reversed and the cause remanded ; the other judges concur.

AMERICAN IRON MOUNTAIN Co., Appellant, v. EVANS *et al.*,
INTERPLEADERS, Respondents.

1. The admissions or declarations of one partner are competent evidence against the other partners ; if made after the dissolution of the partnership they are not competent evidence.

Appeal from Washington Circuit Court.

T. C. Johnson and Beal, for appellant.

I. There being no proof of a dissolution, Reed was still a

partner, and his declaration, made both before and after the deed of trust was made, that Redden owed the firm of A. Reed & Co. nothing, that he had paid up every thing, was certainly competent evidence in this case. The court also erred in refusing to strike out the interplea.

Noell, for respondent.

I. There was no error in refusing to strike out the interplea. The only books in which there were any charges against Redden were produced. It was competent for Reed when he withdrew from the firm or before to turn over the whole debt of Redden to J. S. & J. R. Evans.

RICHARDSON, Judge, delivered the opinion of the court.

There is evidence tending to show that the indebtedness of Redden to the interpleaders, whatever it was, accrued at the store kept at Kennett's square by the interpleaders and Reed in the name of A. Reed & Co., and there is no dispute that at one time Reed was a partner in that establishment. But though he may have been a partner at the time the account was made, it was competent for him, on his retirement from the firm, to transfer all his interest or his interest in any particular account to the other partners, and then he could make no admission to the disparagement of their rights. Conceding that the acts of Reed in procuring the execution of the deed of trust and naming the interpleaders as the sole beneficiaries in it is evidence that he had previously transferred whatever interest he had in the accounts, that fact does not meet the offer of the plaintiffs to show that before the execution of the deed Reed stated that Redden had fully paid his indebtedness to A. Reed & Co. The evidence is conflicting as to the time that the partnership was changed by the withdrawal of Reed; some of the witnesses saying that it was before the date of the deed, and others that it was not until several months afterwards; and in the absence of satisfactory evidence on this point, which it ought to be in the power of the interpleaders to produce, the admissions were

Hoffman v. Riehl.

competent for whatever they were worth. It may be that when the declarations are proved they will be insufficient in the opinion of the jury to overcome stronger evidence of the justness of the debt, but they can be considered in connection with the circumstances under which they were made and receive such weight as they deserve.

The interpleaders having produced under the order of the court the books of their establishment at Kennett's square, which they said contained every entry of their transactions with Redden, we will not undertake to revise the discretion exercised by the court in refusing to strike out the plea.

Judge Scott concurring, the judgment will be reversed and the cause remanded.



HOFFMAN, Respondent, v. RIEHL, Appellant.

1. Where there is a palpable omission in the description of a deed, it may be supplied by construction.
2. In the absence of calls for specific objects or other controlling calls, the course will control.

Appeal from St. Louis Circuit Court.

The following is the description contained in the deed of John Steiner to Mary Steiner: "The west half of the east half of the south-west quarter of section 14, township 44 north, range 6 east; and also a piece or parcel of land of the south-east side of the north-west fractional quarter of the same section, township and range—butted and bounded as follows: Beginning at a stake on the line between said section 14 and section 23, from where the corner of sections 15, 22, 23 and said section 14 making but one corner bears west 20 chains distance; thence south 40 chains to a stake; thence north 87 degrees west to the south-west corner of said fractional quarter; thence north two chains and sixty-two links to a stake; thence north 87 degrees east 30 chains to a stake,

Hoffman v. Riehl.

from which a black-jack 12 inches in diameter bears north 48 degrees east, distance 40 links; thence south 42 chains to a stake on said line between said sections [?] to the beginning; and containing as aforesaid 50 acres, be the same more or less," &c.

The court, at the instance of the plaintiff, gave the following instruction to the jury: "1. If the jury find that it is impossible to survey the land intended to be surveyed by the deed of John to Mary Steiner so as to comply with the courses, distances and corners therein called for, then the call in the deed for the 'west half of the east half of the south-west quarter of section fourteen' operates to convey to said Mary the equal half of said west half of said quarter section, and the jury will disregard the other calls in the deed." The court refused the following among other instructions asked by the plaintiff: "2. In considering the deed from John Steiner to Mary Steiner, the jury are authorized to understand and construe it as if the word 'thence' were written between the words 'said sections' and the words 'to the beginning.'"

H. N. Hart, for appellant.

Krum & Harding and *Gibson*, for respondent.

RICHARDSON, Judge, delivered the opinion of the court.

If the only description in the deed had been "the west half of the east half of the south-west quarter of section 14," under some circumstances it would be just and proper to determine the rights of the parties by an equal division of the land between them; but the deed under which the plaintiff claims calls for specific boundaries, courses, distances and corners, which must not be disregarded if they are intelligible and furnish the necessary data for the true location of the land.

The only controversy between the parties arises out of the manner in running the division line between them, and any confusion that may exist in regard to the starting point of the

Hoffman v. Riehl.

survey is entirely immaterial to the decision of this case, because, no matter where the surveyors begin, they all agree that in running the north line, going east, they reach a stake in the north-east corner of the tract, "from which a black-jack, 12 inches in diameter, bears north 48 degrees east, distance 40 links." This corner is on the line that separates the land of the parties, and, being fixed beyond all dispute, the only question to decide is, how the line shall be run from this established point. The language of the deed is "thence south 42 chains to a stake on said line between said sections (14 and 23) to the beginning." The survey begins at some point, no matter where, on a line which is well ascertained between sections 14 and 23, and to close the survey this line must be reached. Now it is evident that the line must not be run from the black-jack corner to the place of beginning, because that would be a great departure from the course indicated in the deed, and quite a difference in the distance called for; besides, the defendant does not insist on such a construction, and of course the plaintiff does not, for it would put him at once out of court. There is manifestly an omission, in the description, of the adverb "thence" after the word sections; and the call should read "thence south 42 chains to a stake on said line between said sections; and *thence* to the beginning;" and the plaintiff is bound to consent to the insertion of this word or admit that he is in possession of a large portion of the defendant's land.

Inasmuch, then, as the starting point is well known, and the object to be reached is ascertained, and the course given, in our opinion the line should be run *south* to the section line, in obedience to the direction in the deed, making proper allowance for the variation of the magnetic needle from the true meridian. The length of this line called for in the deed is 42 chains, and the distance between the corner and the section line, on a due-south course, is 43 chains and 50 links, but the difference is trifling, and distance, being the most uncertain, must yield to the other controlling calls. The plaintiff, however, can not object to the discrepancy of dis-

Frissell v. Fickes.

tance, because the line run according to his theory is 43 chains 60 links, and departs a degree and a half from a due south course.

The other judges concurring, the judgment will be reversed and the cause remanded, to be tried in conformity to this opinion.

FRISSELL *et al.*, Defendants in Error, v. FICKES *et al.*, Plaintiffs in Error.

1. An umpire, chosen by arbitrators upon their own disagreement to decide the matter submitted to arbitration, must be sworn before he can hear the evidence in the cause.
2. Where a matter in dispute is submitted to arbitrators with a power on their part in case of a disagreement to call in an umpire, the umpire may be appointed before the arbitrators commence their investigation, or at any stage of the proceedings; he ought to see and hear the witnesses.
3. It does not invalidate an award that the arbitrators join with the umpire in making the same.
4. Where in a submission to arbitration the matter in dispute is stated to be the "taking of a quantity of timber from the land" of the plaintiffs, the arbitrators would not be authorized to assess treble damages.

Error to Washington Circuit Court.

The error complained of in this case is the affirmance of an award made under the following agreement of submission: "Whereas M., J. & J. Fickes, a firm composed of Morgan Fickes, John Fickes and Jacob Fickes, have taken a quantity of pine and oak timber growing and being upon the land of M. Frissell and M. A. Todd; and whereas it has been agreed between M., J. & J. Fickes on one part, and Frissell and Todd of the other part, to refer the amount of damages they, said Frissell and Todd, could and ought to recover by law from said Fickes for the taking of said timber to the arbitration of George Walton on the part of Frissell and Wood, and J. W. Johnston on the part of said Fickes; and it is agreed between said parties that in case said arbitrators can

Frissell v. Fickes.

not agree upon the amount of damages to be awarded, the arbitrators above named may select an umpire to settle such matter as they may agree upon. It is further agreed that the amount of damages assessed by said arbitrators shall be paid or secured forthwith, and in default of such payment or security the said award shall be made and become the judgment of the circuit court of Washington county; and the said M., J. & J. Fickes bind themselves to comply with the law rendering judgment by confession. In testimony whereof we have hereunto set our hands and seals this 8th day of July, 1856. [Signed] M. Frissell (seal), M. A. Todd (seal), Morgan Fickes (seal), John Fickes (seal), Jacob Fickes (seal)."

An award was made signed by the two arbitrators above named and Jesse McIlvaine, whom they had called in as umpire. They awarded treble damages to the plaintiffs. McIlvaine, the umpire, heard the testimony introduced before the arbitrators, but he was not appointed or sworn until after the arbitrators had heard all the testimony; no new testimony was introduced before the umpire. Motions to affirm the award and to vacate the same were made in the circuit court. The court affirmed the award.

Noell and Carter, for appellants.

I. The fact that McIlvaine, the umpire, was not sworn until all the evidence was closed, and that after being sworn he heard none of the evidence, makes the award a nullity, and no judgment could lawfully be entered upon it. (*Toler v. Hayden*, 18 Mo. 399.)

II. Treble damages should not have been allowed. Taking timber does not make the taker liable under the first section of the act concerning trespasses. (*R. C.* 1855, p. 1552.)

Frissell, for respondents.

I. The arbitrators were not called upon to appoint an umpire until they had disagreed. It was not necessary that he should hear any of the evidence. The submission contem-

Frissell v. Fickes.

plates that the arbitrators should state to him the matter upon which they differed, and that he should settle it. In point of fact he did hear all the testimony. There was no error in awarding treble damages.

SCOTT, Judge, delivered the opinion of the court.

It is objected to the award that the umpire was not sworn. Arbitrators must be sworn before they hear the evidence. (Toler v. Hayden, 18 Mo. 399; Caldwell on Arbitration, 101 note.) A submission to two arbitrators and their umpire, or to two and their umpire *in case of disagreement*, means precisely the same thing; for umpire, in the common signification of the word, denotes a person that is to make an end of the matter, if the others can not. (Bac. Abr. Arbitrator D., 279; 10 B. Mon. 123.) If arbitrators join with the umpire in the deed of umpirage, it is merely surplusage and the deed is good. (3 Burr. 1474; Bates v. Cook, 9 Barn. & Cr. 407.) It is now established that the arbitrators do not divest themselves of the power to proceed in the reference by nominating an umpire. Such appointment may be made either before or after their own investigation of the matter has commenced, or in any stage of their proceedings. In one case, the court of King's bench expressed their opinion that it was the fairest way to do so in the first instance. (Roe v. Doe, 2 Term, 644; Harding v. Watts, 15 E. 556; Bac. Tit. Arb. 279.) In the case of Salkeld v. Slater, 12 Adol. & Ellis, —, it was said that it is important to have it understood that the umpire, as well as the arbitrators, ought to see and hear the witnesses. In Passmore v. Pettel, 4 Dallas, 271, the court say, where an umpire is to be chosen by referees, he stands in the same situation precisely as the referees themselves, both with respect to the powers to be exercised and the duties to be performed. From this principle it seems to follow that the umpire, when he takes upon himself that character, must proceed in the examination of the matter submitted to him in the same manner as the arbitrators are required to do. Then the umpire must be sworn before he can hear the evidence.

Herrington v. Herrington.

We do not see the ground on which the arbitrators proceeded in trebling the damages. There was nothing in the terms of the submission which authorized such a step. It is certainly the fairest way to have it expressly understood that the damages shall be trebled, if that is the agreement, by making it a part of the submission. But what we consider as conclusive on this subject is, that it does not appear from the matter submitted to arbitration that it was such a trespass as would have warranted the court in trebling the damages had the cause not been referred.

Reversed and remanded. Judge Richardson concurs.

HERRINGTON *et al.*, Appellants, HERRINGTON *et al.*, Respondents.

1. Where a father, being in failing circumstances, purchases land and causes the title to be vested in a third person in trust for his own children with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of his creditors; this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors.
2. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned.

Appeal from Jefferson Circuit Court.

The object of this action is to obtain a decree of title to certain lands in Jefferson county. The plaintiffs are Isaac A. S. Herrington, who sues by his next friend, and his father Isaac Herrington. The defendants are John Herrington, James A. Beal and Bazile Hiney. The facts as they appear in the finding of the facts by the court are substantially as follows: Isaac Herrington purchased the land mentioned in the petition and caused the legal title to be vested in John Herrington with a view to defraud his creditors, of whom James A. Beal was one. John Herrington executed a title bond by which he agreed to convey said land to the two in-

Herrington v. Herrington.

fant children of said Isaac Herrington. One of said children has since deceased, leaving his brother and father his only heirs. Beal obtained a judgment for his debt, and caused all the interest of Isaac Herrington in said tract to be sold under an execution, and became the purchaser thereof at the sheriff's sale and received the sheriff's deed therefor. Beal also obtained a conveyance of the legal title from John Herrington. Beal conveyed said tract of land on the 21st of January, 1855, to Thomas C. Fletcher as trustee for Jefferson county, to secure certain indebtedness due to said county from said Beal. Said Fletcher, as trustee, sold and conveyed said land on the 16th of August, 1856, to Bazile Hiney. The court refused to grant the relief prayed on the ground, as stated in the finding, that the claim of plaintiffs was "tainted with fraud."

Fletcher and Greene, for appellants.

Noell and Beal, for respondents.

I. The transaction was fraudulent with respect to Isaac Herrington's creditors; they are entitled to the land. (12 Mo. 169; 14 Mo. 160; 15 Mo. 62; 16 Mo. 225; 17 Mo. 209; 18 Mo. 174, 299; 23 Mo. 579, 588, 168; 24 Mo. 282; 25 Mo. 329; 10 Mo. 303; 5 Mo. 296.)

RICHARDSON, Judge, delivered the opinion of the court.

Before and at the time the transcript of Beal's judgment was filed in the office of the clerk of the circuit court, Isaac Herrington was insolvent, and the land, being held by John Herrington fraudulently for the purpose of shielding it from Isaac's creditors, was subject to Beal's execution. The unrecorded title bond, by which John Herrington agreed to convey the land at a future day to Isaac's children, could not and did not defeat the judgment lien, and the sheriff's deed to Beal operated to convey the beneficial interest in the land. (*Rankin v. Harper*, 23 Mo. 579.) The deed of John Herrington to Beal did not certainly weaken the latter's title; for, if Beal had no notice of the title bond, the deed passed

Herrington v. Herrington.

the whole estate, and if he had notice, as the bond was fraudulent, he could stand on the sheriff's deed.

But Hiney represents all the title that passed by the sheriff's deed and the conveyance from John Herrington to Beal, and he is therefore the real defendant, who must be affected with notice of the plaintiffs' equities before they can recover in any aspect of the case. Hiney claimed the land as a purchaser under a deed of trust made by Beal to the trustee of Jefferson county, dated 21st June, 1855, and under a deed made by Beal to him for his equity of redemption, dated 16th November, 1855; and the only evidence to charge notice on him was the suit which the plaintiff had brought and dismissed against John Herrington and Beal. It appears that the petition in that suit was filed October 10th, 1855, on which the summons did not issue until the 21st of March, 1855, and was dismissed on the 29th May following. There was no proof that Hiney had actual notice, but it was sought to charge him as a purchaser *pendente lite*. Though the petition was filed in October, there was no *lis pendens* as to strangers until the process was served, which was several months afterwards. (Murray v. Ballou, 1 John. Ch. 576; Lyle v. Bradford, 7 Mon. 116; 2 Sug. on Vend. 544.) And that suit having been discontinued, it did not affect Hiney in this suit, for the policy, on which the doctrine of *lis pendens* is founded, is to give full effect to the judgment which might be rendered in the suit depending at the time of the purchase; and the pendency of a suit at the time of purchase, which is subsequently dismissed, will not affect the purchaser with notice in a new suit. (Newman v. Chapman, 2 Rand. 103; Watson v. Wilson, 2 Dana, 408.)

Judge Napton concurring, the judgment will be affirmed.

PATTERSON *et al.*, Respondents, v. JUDD, Appellant.

1. A. agreed to deliver to B. at a specified place on the Mississippi river "two rafts of pine logs containing each from 350,000 to 400,000 feet, more or less—one raft to be of the first run in the spring, and the other as soon thereafter as possible (want of sufficient water and dangers of navigation excepted); and in case of a loss of a portion of said rafts the loss to be deducted *pro rata* as per number of logs contained in the whole." A. brought to the place specified a raft containing 419,226 feet; he cut off and delivered to B. 323,385 feet of this raft, B. demanding the whole raft. *Held*, in a suit by B. to recover damages of A. for his refusal to deliver the whole raft, 1st, that B. was not entitled under the contract to demand the whole raft of 419,226 feet, the words "more or less" not covering so great an excess as 19,226 feet; that the delivery of a raft containing any quantity of logs between 350,000 and 400,000 feet would be a legal compliance with the contract; 2d, that it was competent for A. to show that when the raft in question started from his boom in Minnesota, it contained, according to the St. Croix scale and measurement, 486,402 feet of logs, and that 67,176 feet were lost, by reason of want of water and dangers of navigation, in running it to its place of destination.

Appeal from St. Louis Court of Common Pleas.

This was an action to recover damages for an alleged breach of the following agreement: "Articles of agreement between Judd, Walker & Co. and Patterson & Ferguson, made and entered into at St. Louis this twenty-first day of January, A. D. 1856, witnesseth, that for and in consideration of the sum of sixteen dollars per thousand feet according to the St. Croix scale and measurement—which scale bill shall exhibit the number of pieces, logs and feet with their original marks—payable one-third in cash, one-third in their negotiable note at three months, and one-third in their negotiable note at five months from delivery—Judd, Walker & Co. agree to deliver to the aforesaid Patterson & Ferguson, in the eddy at or above Bremen, two rafts of pine logs containing each from 350 to 400 M feet, more or less—one raft to be of the first run in the spring, and the other as soon thereafter as possible (want of sufficient water and dangers of navigation excepted)—as large a portion of said sticks to

be eighteen feet or more in length as can be conveniently got in rafting from boom; and in case of loss of a portion of said rafts, the loss to be deducted *pro rata* as per number of logs contained in the whole; and the said Patterson & Ferguson are to pay the discount on the first notes of three months. [Signed] Patterson & Ferguson (seal), Judd, Walker & Co. (seal)."

The plaintiffs alleged that in the month of November, 1856, a raft of pine logs containing 419,226 feet, belonging to Judd, Walker & Co., and of the first run in the spring of that year, arrived in the eddy at or above Bremen; that of this raft said Judd, Walker & Co. cut off and delivered to plaintiffs only 323,385 feet, refusing, although plaintiffs demanded the whole of said raft, to deliver more than said amount.

The defendant in his answer admitted the execution of the above contract; and averred that, during the first run in the spring of 1856, he started from his boom in Minnesota a raft of pine logs for the plaintiffs according to the terms of the contract, but that by reason of want of water and dangers of navigation this raft did not reach Bremen that year; that during the same first run in 1856 he started from his boom another raft of pine logs to be run to Bremen, which was a larger raft than the plaintiffs by the contract were entitled to and was not intended for them, and containing by the St. Croix scale 486,402 feet; that this is the same raft mentioned in the petition; that it arrived at Bremen in November, 1856, but had lost in navigation 67,176 feet of logs, so that when it reached Bremen it contained 419,226 feet; that from this raft, as by the original scale bill, he delivered to plaintiffs a raft, for the first raft under said contract, containing 375,204 feet; that the *pro rata* of the whole loss in navigation as per number of logs contained in the whole raft chargeable upon the quantity so delivered to the plaintiffs was 51,819 feet, which share of the whole loss defendant deducted from the raft so delivered, as he was entitled to do by the terms of the contract; wherefore the said raft deliv-

ered was reduced to 323,385 feet; that the raft delivered was fully equal to the requirements of the contract.

At the trial the defendant offered to prove the facts as set up in this answer. The court ruled out the testimony as incompetent, and instructed the jury as follows: "The defendants were bound under their contract to deliver to the plaintiffs the whole of the logs contained in the raft which arrived at Bremen."

A. N. Crane, for appellant.

I. The court erred in refusing to admit evidence to prove the size of the raft when it started and the loss of logs sustained in running it to Bremen. The plain intent of the parties to the contract was that as many logs should be started as plaintiffs were by the contract entitled to; but if unavoidable loss occurred in running them, this loss should be considered in estimating the quantity delivered. By distributing the loss *pro rata*, we have, for the amount delivered under the contract, 375,204 feet, which is as many feet of logs as the contract entitled the plaintiffs to for one raft.

II. The instruction given to the jury was erroneous. The contract should be construed precisely as if the words "more or less" did not occur in it; for the manifest intention of the parties, by using the two numbers, was to give the words "from" and "to" the sense of *between*, and thus to fix the size of the raft *between* 350,000 and 400,000 feet; if the words "more or less" conflict with the intention so manifested, or are in any sense opposed to the definite clause, they must give way and be rejected. The subject matter of the contract is not a particular raft but a number of feet of logs. The parties buy and sell by the thousand feet and not by the raft. The raft in question had no existence until long after the contract was made. This particular raft was not contemplated by the parties; indeed no particular raft was. The rafts might have been run in whatever size the condition of the river made necessary. A large raft might be divided into several small ones, or several smaller rafts might be united into one

large raft. If the words "more or less" should not be rejected, they should be applied distributively so as to make the clause as to quantity read: "Containing each *from* 350,000 feet or *more*, to 400,000 feet or *less*." At most, plaintiffs were not entitled to more than 400,000 feet of the raft that arrived at Bremen. The words "more or less" would not cover so great an excess as 19,226 feet. (See *Deisborough v. Nelson*, 3 Johns. Cas. 81; *White v. Tancray*, 9 Leigh, 947; *Small v. Quincy*, 4 Greenl. 497; *Blaney v. Rice*, 20 Pick. 62; *Cross v. Eglin*, 2 Barn. & Adol. 106.)

S. T. & A. D. Glover, for respondents.

I. The plaintiffs were entitled to the whole raft that reached Bremen. If this raft had contained 900,000 feet, plaintiffs would have been entitled to the whole of it. If it had reached Bremen with only 50,000 feet, plaintiffs could have demanded no more. The attempt to show that a raft containing 375,204 feet was delivered by distributing a "*pro rata*" loss, is futile. The expression "*pro rata*" does not apply to one raft at all. If it has any meaning in the connection in which it is used, it must refer to the two rafts. The instruction given was correct.

Scott, Judge, delivered the opinion of the court.

The court, in rejecting the evidence offered by the defendant, seems to have discarded from its consideration that part of the contract in which it is provided that "in cases of loss of a portion of said rafts, the loss to be deducted *pro rata* as per number of logs contained in the whole." The evidence, if admitted, might have thrown some light on this clause, which it must be admitted is rather obscure. The defendant, having agreed to deliver some logs at a fixed price, may have preferred to risk the market price for others, and would therefore send out a larger raft than would fill his contract with the plaintiffs. If this raft was lessened in bringing it to market, then the loss would be deducted rata-

bly from the portion reserved or intended for the defendant and the portion to which the plaintiff would be entitled. We see no other way of interpreting the contract. The construction contended for by the plaintiffs, that the intention of the parties was that any loss that might happen in bringing down the rafts was to be divided ratably between the *two* rafts, effects nothing. What object is obtained by dividing the loss between the two rafts so far as either the plaintiffs or defendant are concerned? If both rafts were to be received notwithstanding any diminution they might sustain, where was the motive to any such clause in the contract? In the absence of the evidence offered by the defendant, any interpretation we may put upon the contract must be more or less conjectural, and the evidence, when received, may show that in this matter we are in error.

In construing this contract, we see no reason for departing from the usual signification of the words "more or less," because the rafts are described as containing each from 350 to 400,000 *feet, more or less*. These terms apply to the two extremes, although their force is necessarily modified by the circumstance that any quantity of logs between 350 and 400,000 feet would be a legal compliance with the contract. These words would ordinarily cover a small excess or deficiency proportioned to the amount named, so that the parties would not be subjected to the inconvenience of a small excess in complying, or a small deficiency in not complying, with a contract, by leaving the excess on the hands of the vendor in the one event, or refusing to take the amount offered by reason of the deficiency on the other. The term "more" would not compel a party to take an indefinite quantity, nor would the term "less" force him to take a quantity bearing no proportion to that stipulated. (*Cross v. Eglin*, 2 Barn. & Adol. 106.) In my opinion, nineteen thousand feet is a greater excess than the plaintiffs would have been bound to take; consequently, the defendant was not bound to deliver that quantity.

It will be observed that the evidence offered by the defen-

Fath v. Meyer's Adm'r.

dant and rejected by the court was called for by an express reference to it in the contract.

Reversed and remanded. Napton, Judge, concurs in reversing the judgment; Richardson, Judge, not sitting, having been of counsel.

FATH, Respondent, v. MEYERS' ADMINISTRATOR, Appellant.

1. A., a blacksmith, sued B.'s administrator to recover a blacksmithing account of five years' standing, amounting altogether during that time to \$183.25, the balance claimed after allowing credits being \$97.25. *Held*, 1st, that in order to account for the non-production of the plaintiff's books, it might be shown that the books were kept by the plaintiff himself; 2d, that, some of the particular items charged being proved, it was competent for the plaintiff to show, in support of his general account, that B. had all his blacksmithing done at plaintiff's shop; that B.'s farm was of a particular extent, and that he had thereon a particular number of horses and wagons, and testimony of a like character.

Appeal from Perry Circuit Court.

This was an application to the county court of Perry county for an allowance of an account in favor of the plaintiff against the estate of John Meyers, deceased. On appeal to the circuit court, judgment was rendered in behalf of plaintiff. No instructions were asked or given. It was not shown that the plaintiff supported his claim by his affidavit in the circuit court.

Noell, for appellant.

I. The circuit court erred in permitting evidence to be introduced as to the correctness with which plaintiff's books were kept. Connecting that evidence with general statements of other witnesses to the effect that Meyers was in the habit of having his blacksmith's work done at the plaintiff's shop, and also with evidence as to the extent of Meyers' farm, and the number of teams he worked, plaintiff was permitted to prove his account as a whole without proving the items.

Fath v. Meyer's Adm'r.

(1 Greenl. Ev. 117.) The affidavit required by law does not appear to have been made. The verdict was clearly against the evidence.

T. C. Johnson, for respondent.

I. The evidence objected to was admissible. The presumption is that the county court did its duty in requiring an affidavit of plaintiff. If it did not, it devolves on defendant to show that. It is too late to insist on this point.

NAPTON, Judge, delivered the opinion of the court.

This action was brought to recover a blacksmith's account of some five years' standing, amounting altogether during that period to \$183.25, and with credits to the amount of \$86—leaving a balance claimed of \$97.25. The principal question presented here is as to the admissibility of the evidence which the circuit court permitted to go to the jury and upon which the verdict was rendered. This evidence was, that the plaintiff kept his own books and kept them generally correctly; that Meyers had all his blacksmith's work done at plaintiff's shop; that Meyers' farm was of a particular extent; that he employed a particular number of horses and wagons; and other testimony of this character, which, together with positive proof of various items identified particularly by different witnesses, went to the jury.

It is very certain that, if testimony of this character is not allowed, very few of such accounts can be proved in this State. Many farmers own shops entirely under the superintendence of a negro blacksmith. The business is one which, in the country and in small interior villages, does not justify the employment of a clerk, and the items in such accounts are frequently so trivial that it would be unreasonable to expect positive and direct proof. These circumstances will not, it is true, authorize the courts to disregard any settled rule of evidence; but the testimony in this case is certainly competent, and of its pertinency the jury could judge. A jury of practical men would not be likely to go much out of the

Hull v. Lyon.

way in arriving at the probable amount of a man's blacksmith account when they are informed of the extent of his operations in which such work would be required. We do not say that such evidence would in all cases be sufficient or even in all cases proper, but, taken in connection with the other proof in this case, it was legitimate evidence for the consideration of the jury.

The plaintiff's books of account were not offered in evidence. The testimony as to how they were kept was necessary to explain and account to the jury for their absence. If they had been kept by a clerk, it might have been expected that he should have been called and the books produced. As our practice does not allow their introduction when kept by the plaintiff, proof of this fact was material and pertinent.

As to the weight of evidence in this case, it is not our province to interfere; but if we were to pass any opinion upon the point, we could not say that \$183 was an unreasonable blacksmith's account for five years for a man in Meyers' circumstances.

It does not appear that the preliminary oath, required by the statute to authorize allowances against an estate in the county court, was called for in the trial of this case, or that any objection was made on this ground. After a plaintiff has established his demand, contested as this was, by the verdict of a jury and the judgment of the circuit court thereon, it would seem folly to send the case back for the plaintiff's oath to be superadded.

The other judges concurring, the judgment is affirmed.

HULL, Respondent, v. LYON *et al.*, Appellants.

1. Communications made to an attorney at law as such are privileged, and the attorney can not be permitted to testify concerning them without the consent of the client. This rule applies to the case where two persons, having hostile interests, consult the same attorney, at the same time, with respect to the matter in dispute, and one of such parties calls upon the attorney to

Hull v. Lyon.

- testify with respect to the declarations and admissions made by the other at the consultation.
2. Whether a communication is a privileged one is a question for the court.
 3. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the interlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court.
 4. Where, during the pending of a suit to foreclose a mortgage, third persons become interested in the premises by purchase, it is not necessary, in order to authorize a decree against them in respect of the interest acquired by them, to make them parties to the suit; they may be made defendants, on their own motion, under the sixth section of the act concerning mortgages. (R. C. 1855, p. 1089.)

Appeal from St. Louis Circuit Court.

This was a suit commenced by Joseph S. Hull on the 8th of November, 1852, to foreclose a deed of trust executed April 17, 1841, by Robert N. Moore and Alexander Moore, to secure the Bank of Missouri the payment of a note drawn by Robert N. Moore and endorsed by Alexander Moore and discounted by said bank, and to secure the payment of any note that might be given in renewal of the same. The petition stated that after several renewals of the original note, Robert N. Moore executed his note for \$1,843.34, dated December 23, 1842, which was endorsed by Alexander Moore and by the plaintiff Joseph S. Hull, and discounted by the Bank of Missouri in renewal of the first note; that this note was not paid at maturity and was protested; that the plaintiff Hull, at the request of Robert N. Moore, paid said note to the bank on the 12th of November, 1848, and received an assignment of the deed of trust on the 15th of November, 1848. The land conveyed by said deed of trust was the undivided two-thirds of a tract of three by forty arpens. The

Hull v. Lyon.

petition further stated that Robert N. Moore was dead, having devised his property to his widow Anna M. Moore, who afterwards married James M. Lyon; that Hugh A. Garland was executor of said Robert N. Moore; that Alexander Moore died, leaving as his heirs Elizabeth Hull, said Robert N. Moore, Julia N. Moore and Elizabeth Moore; that Elizabeth Moore was also dead; that Julia N. Moore was an infant; that by order of the probate court the title and estate of Robert N. Moore in the premises had been sold and that James M. Lyon became the purchaser, but had not paid the purchase money and a deed had not been made.

The parties to this suit originally were James M. Lyon and Anna M. his wife, Julia N. Moore, and Hugh A. Garland, executor of Robert N. Moore. Afterwards Julia N. Moore marrying David C. Hall and dying leaving a daughter, said Hall and daughter were made parties. Garland also died and the administrators *de bonis non* of Robert N. Moore and of Alexander Moore were made parties. The defendants put in issue the allegations of the petition, alleging that Robert N. Moore had himself paid the note described in the petition. The court submitted to a jury an issue whether the plaintiff had paid the note to the bank with his own money. Upon the trial of this issue, Judge Lord was called as a witness in behalf of the plaintiff. He testified that both Hull, the plaintiff, and Robert N. Moore came to the office of Leslie & Lord for advice about this note and deed of trust and the transfer to plaintiff. He was required, against the objection of the defendants, to testify concerning statements made by Moore at that interview. The jury found the issue for the plaintiff.

The court, in its finding, found substantially the execution of the deed of trust and note as alleged; that plaintiff paid the note at the request of R. M. Moore and took an assignment of the note and deed of trust; that at the institution of this suit he was the holder thereof for value. After the death of said Robert N. Moore, and before the institution of this suit, on the 17th of November, 1851, the right, title and

Hull v. Lyon.

interest of Robert N. Moore in said tract was sold, under the order of the probate court, to James M. Lyon. Lyon not being able to comply with the conditions of sale, John S. McCune and Peter L. VanDeventer were substituted and received a deed from Hugh A. Garland, dated September 21, 1853. It also appears that at the October term, 1853, of the St. Louis land court, Julia N. Moore instituted a suit in partition against Joseph S. Hull and his wife Elizabeth, James M. Lyon and Anna M. his wife, Peter L. VanDeventer, John S. McCune and George W. Putnam; that in this suit partition was made according to the respective rights of the parties. The commissioners assigned to McCune and VanDeventer, for the interest acquired by them under the above deed of the executor of Robert N. Moore, certain lots designated as lots numbered 1, 2, 4, 5 and 6. McCune and VanDeventer were also required to pay said Elizabeth Hull the sum of \$300 to equalize the difference in the value of the lots assigned to said McCune and VanDeventer and those assigned to said Elizabeth Hull. This partition was made at the October term, 1855, of the St. Louis land court. In his answer in this suit, said Hull set up his claim under the deed of trust. McCune and VanDeventer denied the existence of this claim. Judgment for partition was given without reference to it. It also appeared from the finding that, after said petition was made, said Elizabeth Hull died leaving her surviving two children. Joseph S. Hull instituted proceedings against his said children for partition of that part of said three by forty arpent tract that had been assigned to said Elizabeth Hull. Such proceedings were had in this suit that partition was made, and under the judgment of the court the land was sold and the plaintiff became the purchaser.

The court ordered a foreclosure, in behalf of plaintiff, of the deed of trust in respect to those portions of the three by forty arpent tract that had been assigned to McCune and VanDeventer in the partition suit above mentioned, and ordered the sale of said lots numbered 1, 2, 4, 5 and 6.

Hull v. Lyon.

Whittelsey, for appellants.

I. The court erred in permitting Judge Lord to testify. The communications made to him were privileged although the same attorney was consulted by both parties. (1 Greenl. Ev. § 241, 240; 2 Stark. Ev. 229; *Cromach v. Heathcote*, 2 B. & B. 4; *Parker v. Carter*, 4 Munf. 273; *Wilson v. Troup*, 7 Johns. Ch. 25; *Doe v. Seaton*, 2 Ad. & El. 171; *Doe v. Watkins*, 3 Bing., N. C., 421.)

II. Hull having failed to establish his mortgage in the partition suit, the question became *res adjudicata*. (2 Johns. 210; 12 id. 313; 2 Conn. 435; 5 Wend. 245; 3 Johns. 220; 7 Cranch, 557; 5 Hill, 114; 9 Cow. 271; 1 Watts, 149; 8 Mo. 120.) The finding was erroneous in declaring that McCune and VanDeventer (who are not parties to the suit) purchased after the commencement of this suit. As they took the place of James M. Lyon, their purchase goes back to the date of his purchase, September 18, 1851. The court also erred in not declaring what were the interests of the parties as established in the land court in the partition of *Julia N. Moore v. Hull* and others. The court also erred in finding that the interest set off in the partition suit to McCune and VanDeventer was that which Robert N. Moore had in the whole tract at the date of the deed of trust. One-ninth descended from Alexander Moore; four-ninths of said tract belonged to R. N. Moore at the time of his death.

III. Plaintiff submitted to a partition of these lands in fee, and is estopped from destroying the effects of this partition by selling the property, part of which his wife inherited and which he now holds by purchase at a partition sale based upon the previous partition. A proper sale under the deed of trust would divest the title of two-thirds of the land and thus enforce a new partition. (6 Verm. 395; *Phelan v. Kelly*, 2 Wend. 389; *Jackson v. Streeter*, 5 Cow. 529; *Jackson v. Hinman*, 10 Johns. 292; *Vanhorn v. Fonda*, 5 Johns. Ch. 406; *Picot v. Page*, 26 Mo. 398; 3 Dana, 326.) The judgment is also erroneous in that it directs the shares

Hull v. Lyon.

assigned to McCune and VanDeventer to be sold separately, when they were not before the court, and consequently the court acted without having the proper parties before it. McCune and VanDeventer, in the partition, paid the plaintiff money to equalize the shares; yet this land for which the plaintiff has received their money is to be sold, while the share that plaintiff's wife received through Alexander Moore is unsold.

IV The only decree the court was authorized to make was that the equity of redemption in the whole property mortgaged be foreclosed and the property sold to pay the mortgage debt. Lyon bought subject only to legal claims and encumbrances, and not to any unknown equities that might have existed between Robert N. Moore and Alexander Moore. The land of Alexander was subject to the encumbrance for the whole debt as well as the share of Robert N. The court threw the whole burden upon the one-third of Robert N. Moore and the one-ninth that came through Alexander Moore. The subsequently acquired one-ninth was not subject to the mortgage except through the conveyance made by Alexander Moore. Lyon and McCune and VanDeventer under him were purchasers for value in good faith and without notice of any equities existing between R. N. and Alexander Moore to throw the whole burden on Robert's share.

Krum & Harding, for respondents.

I. The testimony of Judge Lord was competent. His testimony was not within the rule of privileged communications.

II. The court properly subjected the interest allotted to McCune and VanDeventer to the satisfaction of the deed of trust. The parties who purchased Robert N. and Alexander Moore's undivided interest, or the interest of either, in the mortgaged premises, took it *cum onere*. When this interest was set apart in the partition suit the encumbrance followed it. The finding was sufficient to sustain the judgment. It

Hull v. Lyon.

was not necessary that McCune and VanDeventer should be made parties to the suit.

Scott, Judge, delivered the opinion of the court.

The act concerning witnesses prescribes that an attorney shall be incompetent to testify concerning any communication made to him by his client in that relation or his advice thereon, without the consent of such client. (R. C. 1855, p. 1578.) Though Hull, the plaintiff, had an interest with Moore in the matter about which the common attorney was consulted, he had no right to any communications Moore might have made. The aim of the evidence was to affect Moore and those claiming under him. Any information Moore may have communicated, or any facts he may have stated, or admissions he may have made, to his attorney, can not be disclosed at the instance of one who had a hostile interest in the subject of the consultation, although he attended it and employed the same attorney to advise as to his rights and interests in the matter about which they consulted. The consent of both parties was necessary to make the attorney a competent witness. Whether a communication is a privileged one is a question for the court.

We do not see in what way the defendants were affected by the omission of the court to declare the interests of the parties to the land as established in the partition suit of *J. N. Moore v. Hull et al.* If they were subjected to the payment of no more of the mortgaged debt than their interest in the land was subject to, they have no cause of complaint.

In the partition suit referred to, Hull set up the mortgage and prayed the benefit of it. Hull was not bound to do this, and his failure to do it would not have affected his rights. But notwithstanding this, if he did set up his mortgage and it was determined against him, he, it seems, would be bound by the judgment. (*Thompson v. Wineland*, 11 Mo. 243.) A mortgagee is not compelled to notice the partition of premises on which he has a mortgage, only so far as in a proceed-

Hull v. Lyon.

ing to foreclose he must see that the proper parties are brought before the court. McCune denied the existence of the mortgage debt, and nothing more is disclosed in relation to the matter. Under such circumstances, the record at most would furnish only *prima facie* evidence that the matter was passed upon by the court. It would be competent to show by parol evidence that, although stated in the pleadings, yet in fact the matter never was submitted to the determination of the court. (State v. Morton, 18 Mo. 53.) But the difficulty in relation to this is that McCune is no party to this suit. This is insisted on by him in this court. How then can he have the benefit of an estoppel, created by a judgment in one suit, in another suit to which he is no party?

The interest of McCune and VanDeventer in this litigation arose at the time they made the contract to purchase Lyon's interest. Whatever benefit may be derived from the doctrine of relation as between the parties to the agreement to purchase, in determining the question whether they were proper parties to this suit we can only look at the date of the contract by which they became interested.

We do not conceive that there is any thing in the point that Hull is estopped by the judgment in partition from asserting his right under the mortgage. Owners of the equity of redemption may have partition among themselves, but mortgage and judgment creditors can not be compelled to join in it. (Wotten v. Copeland, 7 Johns. Ch. 140; Sebring v. Mersereau, Hopkins, 501.) Our statute is silent as to making mortgagees parties to a proceeding for partition.

If McCune and VanDeventer are not parties to this suit, and should have been made so, they will not be affected by it, and they have no right to appear here and raise objections. It is remarkable they did not have themselves made parties, as they might have done under the sixth section of the act concerning mortgages.

The decree of the court below is inconsistent with itself, as it subjects the interest of Alexander Moore in those claim-

Hull v. Lyon.

ing under R. N. Moore to sale, and exempts from contribution that portion of Alexander Moore's interest which is in the plaintiff. The court does not find that there was any equity existing as between R. N. and Alexander Moore, which would subject R. N. Moore's interest alone to the satisfaction of the entire debt as against a purchaser of R. N. Moore's interest. The mortgage subjected the entire interest of R. N. and A. Moore to the payment of the debt. Why should a purchaser of R. N. Moore's interest be compelled to pay the entire debt? The facts in relation to this matter are not found, nor is any thing said in relation to notice of any equity. It does not appear that the decree is based on the circumstance that Alexander Moore was the endorser of the note—a matter about which no opinion is ventured, as it was not discussed in the argument.

If the interest which R. N. Moore originally mortgaged is alone liable for the mortgage debt, it is a matter of no importance in this suit that interests subsequently acquired by those who hold Moore's original interest are likewise subjected to the payment of the mortgage debt, as it appears that the original interest itself greatly exceeds in value the amount of that debt. If the original interest had been insufficient to pay the debt, the injustice of subjecting the after acquired interest would be apparent. The error is entirely a formal one, not at all affecting the rights of the parties. Reversed and remanded, the other judges concurring.

RICHARDSON, Judge. In my opinion, the form of the note *prima facie* indicated the character of the relation of the parties to it, and if R. N. Moore was the principal debtor it would not be inequitable to charge the whole debt on his interest. But if any portion of A. Moore's interest is subjected to the mortgage, the whole interest should be, and the burden ought not to be cast on McCune and VanDeventer, who own only a small part of it. The judgment is inconsistent with the theory on which the cause was decided; and as

Blair v. Marks.

there is nothing in the record to show the value of the interest of McCune and VanDeventer acquired, from R. N. Moore's estate, which he owned at the date of the mortgage, the judgment should be reversed because it is not confined to that interest. I give no opinion on the other points noticed in the opinion of the majority of the court.

BLAIR, Respondent, v. MARKS *et al.*, Appellants.

1. The fifty-sixth section of the act of July 4, 1807, (1 Terr. Laws, p. 138,) authorized the sale, under the order of the general court, of an intestate's estate for the payment of his debts, although he left no lawful issue.
2. The administrator was, in the case of such a sale, authorized to make a deed to the purchaser.
3. After the lapse of forty or fifty years from the date of such a sale, proof of the advertisements and other prerequisites of a legal sale could not be insisted on.
4. Where a party's acts are given in evidence, he may give in evidence, in rebuttal, other acts which are a part of, or connected with and explanatory of, those previously used against him.

Appeal from St. Louis Circuit Court.

This was an action of ejectment to recover a piece of ground at the south-east corner of Main and Bates streets, in the city of St. Louis. Both parties claimed title under Pierre Chouteau. The plaintiff, for the origin of his title, relied on a deed made by Chouteau to Merriwether Lewis in 1810. The defendants deduced title under a deed from Chouteau to Frederick Bates in 1815. The great question in dispute was the true position of the division line between the Lewis and Bates tracts. This question can be fully understood by examining the report of the case of *Evans v. Greene*, 21 Mo. 170, and the diagrams contained in that report. If the location of the Lewis tract should be established as marked out by the red lines of the diagram No. 1, the land in dispute would be brought within the Lewis tract.

The court gave the following instruction to the jury of its own motion: "The deed of Chouteau to Lewis having been made on the 3d of August, 1808, the jury must regard Chouteau's claim as it existed at that time; and if his south-west corner was then understood by him and Lewis to be westward of his south-west corner as it was subsequently fixed by the United States survey, the jury must take it to have been at the place where it was then understood by the parties to be, in ascertaining what land he conveyed to Lewis."

The following instructions were given at the instance of the defendants: "1. The court instructs the jury that the plaintiff claims title under Merriwether Lewis, and if the land in controversy lies outside of the tract conveyed by Chouteau to Lewis, the plaintiff can not recover in this action. 2. If the jury find from the evidence that in 1808 there was known or existed a line which would answer to the description given in the deed from Chouteau of 'the line separating the town lots from the lots which have been granted for cultivation,' then the point in Roy's upper line, which was the beginning point in the description of the Lewis tract, is to be found at the distance of forty-five perches from that separating line, whether the south-west corner of Chouteau's survey be in that line or not. 3. If the jury believe that Risdon H. Price located his tract acquired from Lewis' administrator in such manner that the south-east corner thereof was west of Main street, they will regard such location by Price as a practical construction by him of the deeds under which he claimed title; and, if the location of that tract is otherwise not ascertainable, that practical location will be deemed to be the true one as against Price and those claiming under him. 4. In ascertaining the position of a tract of land conveyed by deed, the highest, and as a general rule the controlling, proof on the subject is the description of its position given by the parties themselves in the deed; and in determining what the parties meant by that description the jury will pay greater regard to calls for

Blair v. Marks.

known or ascertained lines or corners than to calls for the courses of lines and their lengths. 5. If the jury find that Price, while the proprietor of the Lewis tract, in 1817, and Bates, his adjoining proprietor, caused the eastern line of said tract to be established, fixing the same west of the eastern line of the present Main street; that, contemporaneously with such establishment of the eastern line of the Lewis tract, Bates, Smith and Lisa, being proprietors of the adjoining land, with the knowledge and acquiescence of Price, laid out the land east of Main street into an addition to the town, subdividing the same into lots and selling said lots from time to time to different persons; that for more than fourteen years after the laying out of such addition neither Price nor any one under him laid claim to any part of such addition as being within the Lewis tract; and that the land now in controversy is part of such addition, and is held by the defendant under said Bates, Smith and Lisa, then the plaintiff claiming under Price can not recover in this action. 6. The jury are instructed, that, although in the description contained in the deed from Chouteau to Lewis the quantity of area mentioned is of least authority as a descriptive call, yet if the jury are in doubt as to the proper location of the tract by all the other calls, they may resort to the call for quantity to assist them in determining the proper location of the tract."

The following were given on the motion of the plaintiff: "1. If the premises in question are included in the sheriff's deed to Darby, and in Darby's deed to Evans, and Evans' deed to Greene, and his to the plaintiff, and said deeds are genuine, and the title to said premises was in Risdon H. Price at the date of the judgment, execution and levy described in said sheriff's deed, then the plaintiff is entitled to recover, unless the jury should find the facts to be as set forth in instruction No. 5. The rules of location are, 1st, natural boundaries; 2d, artificial marks; 3d, adjacent boundaries; 4th, course and distance; but though these are general rules, they are not inflexible; but an *inferior* means of loca-

Blair v. Marks.

tion may control a *higher*, when it is plain there is a mistake. The evidences of location are resorted to in their order, unless it appear from other satisfactory evidence that there is a mistake. 2. A diagram or plat annexed to a deed, and referred to in said deed as describing the premises therein mentioned, is a part of said deed, and must have the same force as if the description on said plat was contained in said deed. 3. The jury are instructed that they are not to regard the eastern line of the land, as conveyed by Post to Bates by deed given in evidence by the defendants, as evidence showing the location by Price of the lines of the Lewis land, unless they find from the evidence that said line was adopted by Price. 4. If the jury find that the tract conveyed by Price to O'Hara in 1820 can not be located in the south-east corner of the Lewis tract without disregarding the courses and bearings of the lines of said tract as described in the plat accompanying the deed from Price to O'Hara, nor without violating the northern boundary and western boundary as contained in said deed, and the true position of the mounds as then known, they will disregard the words of the general description contained in said deed from Price to O'Hara as follows: "On the *south-east* corner of the said tract of 30 arpens and 93 perches," and they may locate the said tract according to the boundaries and remaining descriptions in said deed, and the natural objects defined on the plats in evidence."

The court refused the following instructions asked by defendants: "1. There is no evidence before the jury proving or tending to prove that the parties to the deed made by Chouteau to Lewis in 1808 intended or understood that the land thereby conveyed was within any particular concession, survey or tract of land known as one single tract. 2. The description contained in the deed from the administrator of Lewis to Price of the land thereby conveyed, is evidence against Price and those claiming under him, including the plaintiff, that the land acquired by Lewis from Chouteau was bounded westerly by the forty arpent lots. 3. The deed of Chouteau to Lewis having been made on the 3d August,

Blair v Marks.

1808, the jury must regard Chouteau's claim as it existed at that time; and if his south-west corner was then understood by him and Lewis to be westward of his south-west corner as it was subsequently fixed by the United States survey, the jury must take it to have been at the place where he then understood it to be in ascertaining what land he conveyed to Lewis."

The court also refused instructions asked by the plaintiff.

Field, E. Bates and B. Bates, for appellants.

Dick, for respondent.

NAPTON, Judge, delivered the opinion of the court.

The validity of the title in dispute in this case depends mainly upon questions of fact. The controversy turns principally upon the ascertainment of the true location of the south-west corner of the tract conveyed by Chouteau to Meriwether Lewis. Whether this corner was fixed by Chouteau in what is now known to be the eastern line of the common field lots, was a question of fact determined by the jury in this case under instructions not complained of. The jury have found that Lewis' south-west corner was not in this line, but some two hundred and twenty feet east of it. Assuming that the Lewis tract is a part of the Chouteau concession, and that the south-west corner of the two tracts is identical, the question still remained whether the corner established by Brown, in 1817, was the same established by Soulard in 1803; for it is clear that Chouteau's conveyance to Lewis, in 1809, by metes and bounds and fixed monuments, can not be controlled by a survey made in 1817. The landmark set up by Soulard at the south-west corner, in 1803, is gone. Hence a mass of testimony was introduced on either side to establish this corner, the plaintiff maintaining that the United States survey of Brown, in 1817, was correct, and established the south-west corner of the survey precisely where Soulard had previously located it, and the defendant insisting that Brown's corner had been placed at least fifty

or sixty feet east of the old Soulard corner. If the latter supposition was true, the defendant was entitled to a verdict, as it appears that a removal of Brown's survey fifty or sixty feet westwardly would leave the defendants' lots outside of the Lewis tract. If the plaintiff's view prevailed, the Lewis title, under which he claimed, would cover the land in dispute. Upon this question of fact, no opinion of this court will be expected, or would be material. Our duty is limited to see that this question was tried under instructions not unfavorable to the party who lost the verdict, and that no illegal evidence was introduced, and no legal evidence excluded.

One of the first links in the chain of the plaintiff's title is a deed from the administrator of Merriwether Lewis, in 1811; and it is insisted that this deed was unauthorized by law; that the sale of which it was evidence was unwarranted by the statute; and that the proofs, which would alone justify the admission of such a deed, supposing the law to have warranted both the sale and the deed, are wanting. The act of 1807, under which this proceeding was had, is as follows (Terr. Laws, p. 138): "If any person shall die intestate, being owner of lands and tenements within this territory at the time of his or her death, and leave lawful issue, but not sufficient personal estate and slaves to pay his just debts and maintain his children, in such case it shall and may be lawful for the administrator to borrow or mortgage, &c., or to sell and convey such part or parts of said lands and tenements as the general court shall in either case, from time to time, think fit to allow, &c., for defraying the debts, maintenance of the children," &c., &c.

It is said that it nowhere appears upon the record of the proceedings of the general court, on the application of Hempstead, administrator of Lewis, to sell real estate of the deceased for the payment of his debts, that he died leaving lawful issue, and therefore that the court had no power to order a sale. This is not our construction of the law. No motive could be suggested that could possibly induce the

Blair v. Marks.

legislature to authorize a sale of the lands of a decedent to pay his debts when he left issue, and deny the power when he left none. To give the power in the former case, implies its existence in the latter. If the legislature would permit the lands of a decedent to be sold although he left children, *a fortiori* would they allow this to be done when he died childless; and this is doubtless the proper construction of the act, although it must be admitted to be expressed in a peculiar and rather inartificial manner. Besides, a contemporaneous construction of this law by the highest judicial tribunal in the territory, made nearly fifty years ago, would hardly be disturbed by this court now, whatever views might be entertained of its true interpretation. But we entertain no doubt that the construction given to the act by the general court of the territory was the correct one.

The power of the administrator to make a deed is implied in the power to sell. Indeed, the language of the statute is to "sell and convey," thereby giving the administrator an express authority to make a deed.

The report of Hempstead, administrator of Lewis, to the general court, of his sale under their order, is sufficient evidence that all the prerequisites to a sale required of him had been complied with. After a lapse of forty or fifty years, proof of the advertisements, which the law required and the court ordered, would hardly be expected or required.

There was no error in permitting the plaintiff to give in evidence the deed from O'Hara to Price, and the accompanying plat. The defendant had given in evidence the deed from Price to O'Hara, obviously with a view to show how Price, under whom plaintiff claimed, had practically located the O'Hara tract. This testimony was legitimate and was admitted, but the admission of this deed from Price to O'Hara undoubtedly authorized the plaintiff to explain Price's conduct in relation to the location of that tract. The testimony was strictly in rebuttal and explanatory of what had been used by the defendant as admissions or declarations or acts of the plaintiff. When Price accepted the deed from

Blair v. Marks.

O'Hara, reconveying to him a part of the identical tract which he had previously conveyed to O'Hara after it had been subdivided into town lots, he became a party to that deed and its accompanying plats; and his act in receiving the deed and acquiescing in the location which that deed tended to prove, was proper to go to the jury in connection with his original deed to O'Hara. The evidence was admissible, we think, upon the same principle which allows a party, whose declarations, admissions or acts are given in evidence by his adversary, to give in evidence further declarations or acts which are a part of, or connected with and explanatory of, those previously used against him.

The second instruction, which is found among the defendant's refused instructions, was properly refused. At all events, its refusal is not, according to the established practice of this court, a ground for reversing the judgment. The deed from Lewis' administrator to Price was in evidence; it was undoubtedly evidence that the land thereby conveyed was bounded on the west by the forty arpent lots, for such was the language of the deed. This the jury could plainly observe without any special instruction on the subject; but when the attention of a jury is called by the court to any specific piece of testimony, it frequently misleads a jury into an idea of its importance which it may not deserve and which the court would not attribute to it. Had the instruction been so framed as simply to call the attention of the jury to that part of the deed as *one* of the circumstances which they might consider in coming to a conclusion relative to the location of this tract, it would probably have done no harm, and the giving of such instruction would have constituted no error; but the instruction was not asked in this shape, and its language might have misled.

The first of the defendant's refused instructions was properly refused. The third is identical with the one given by the court.

The fourth instruction given for the plaintiff is objected to, but that objection presents the same question which was

Blair v. Marks.

raised by the admission of the deed from O'Hara to Price. If the deed and plat were admitted, the court committed no error in declaring the principles of law which ought to guide the jury in locating the O'Hara tract. To the other instructions given for the plaintiff no substantial objections have been suggested. Although the first instruction has been criticised, we do not think it could have been misunderstood. It seems merely designed to convey the idea, that, if the Lewis tract covered the land in controversy, the plaintiff was entitled to recover, unless the fact of an estoppel was found. We can hardly suppose that the jury had any difficulty in understanding it, or that it could possibly have misled.

We do not wish to be understood as passing any opinion upon the plaintiff's refused instructions. Whether right or wrong, their refusal can be no ground of error here. Other cases, as we are informed by the counsel, are still pending concerning portions of this same tract, and therefore an examination of the evidence in detail has been abstained from. It is manifest that there was conflicting testimony, and as we have no power to disturb the verdict, whatever our opinion might be upon the facts, it is unnecessary to express any. The court which tried the case has sanctioned the verdict, and according to well established rules of this court we do not interfere in a case of conflicting testimony.

Judge Scott concurring, the judgment is affirmed. Judge Richardson not sitting, having been of counsel.

[END OF OCTOBER TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

JANUARY TERM, 1859, AT JEFFERSON CITY.*

THE STATE, Respondent, v. HICKS, Appellant.

1. To constitute murder in the first degree, the act of killing must be intentional, and done without justifiable cause.
2. Where a homicide is committed under circumstances that leave it in doubt whether the act was committed maliciously or from an apprehension of real danger, the jury may consider the fact that the deceased was of a rash, turbulent and violent disposition in determining whether the accused had reasonable cause to apprehend great personal injury to himself.

Appeal from Crawford Circuit Court.

Perryman and Carter, for appellant.

Ewing, (attorney general,) for the State.

I. The law of the case was fairly presented to the jury. (State v. Hays, 23 Mo. 318.) The fifth, sixth and seventh instructions asked by the defendant were not the law; they were not warranted by the evidence. The temper and disposition of the deceased were not involved in the prosecution.

* Judge NAPTON was prevented, through indisposition, from attending at this term of the Supreme court.—[REP.]

State v. Hicks.

tion. (Whart. Crim. Law, 296; Whart. on Hom. 249; Wright v. State, 9 Yerg. 344; State v. Hawley, 4 Harring. 562.) The defendant was not prejudiced by the instructions. (7 Mo. 416; 8 Mo. 224; 3 Grah. & Wat. on New Trials, 717.)

RICHARDSON, Judge, delivered the opinion of the court.

The defendant was indicted, tried and convicted of murder in the first degree. On the trial the court gave several instructions, among which is the following: "The court further instructs the jury that malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse; and it is not necessary, in order to support an indictment for murder in the first degree, to show that the act of killing was intentional and done without any justifiable cause."

This instruction is so palpably wrong that it requires no comment to expose it. To constitute murder in the first degree the homicide must be wilful, deliberate and premeditated; and these terms, which define the quality of the offence, necessarily involve the element of a prior intention to do the act in question. An act unintended can not be said to be wilful; and though the natural consequences of an act deliberately done are presumed to have been intended, and premeditation may be inferred from the conduct of the accused, yet in the absence of a felonious intent there can be no murder.

In a capital case, in which it is sought to deprive a man of his life, he has at least the right to demand that it shall be taken away according to law; and though it may be fairly argued that the instruction did not mislead the jury, and had no agency in producing the verdict, we can not in a case of this magnitude enter into a calculation of the chances as to whether or not the defendant was prejudiced by it.

The first instruction asked by the defendant and given properly stated the law, and the fifth and sixth were rightly

refused, because they omitted the necessary qualification that there was reasonable cause on the part of the defendant to apprehend immediate danger of the supposed felonious design of the deceased being accomplished.

There was evidence tending to show that bitter hostility existed between the defendant and the deceased, and that the latter was a turbulent, violent and dangerous man. It also appeared that the deceased, at the time he received the mortal wound, had a gun which he snapped once or twice at the defendant after the latter had fired, but doubt is left by the testimony as to the position of the gun and the attitude of the deceased before he was wounded. On this state of the evidence the defendant asked the following instruction, which was refused: "7. If the jury believe from the evidence that the deceased was of rash, turbulent and violent disposition, and that the defendant had knowledge of such disposition, then it is a circumstance for the consideration of the jury in considering the reasonable cause for defendant's apprehension of great personal injury to himself." In my opinion, this instruction ought to have been given. If the defendant killed Mills under circumstances that showed he did not have reasonable cause to apprehend immediate danger of violence to himself, he can not defend himself on the ground of the vicious character of the deceased, for the law promises the same protection to the persons of all men, and it is as great a crime in the eye of the law to kill without cause a bad man as a good one. But the imminence of danger, that will justify us in acting upon the instinct of our nature in repelling a blow before it is received, often depends on the character of the assailant. The menacing attitude of a person generally peaceable and law-abiding would often excite no just apprehension of danger, whilst similar conduct of a fierce, vindictive and passionate man would naturally alarm our fears and make us prompt in anticipating his purposes. When danger is threatened and impending we are not compelled to stand with our arms folded until it is too late to strike, but the law permits us to act on reasonable

Johnson v. Smith's Adm'r.

fear; and therefore when the killing has been under circumstances that create a doubt as to whether the act was committed in malice or from a sense of real danger, the jury have the right to consider any testimony that will explain the motive that prompted the accused. (Quesenberry v. State, 3 Stew. & Port. 308; Munroe v. State, 5 Geo. 137.)

The judgment will be reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.

JOHNSON & WIFE, Defendants in Error, v. SMITH'S ADMINISTRATOR, Plaintiff in Error.

1. The trusts not reached or affected by the statute of limitations are those technical and continuing trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity.
2. If a person, assuming to act as guardian for another without any legal authority so to do, should receive moneys to be appropriated to the latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it.

Error to Callaway Circuit Court.

Boulware and Kouns, for plaintiff in error.

I. A guardian *de son tort* is a character unknown to the law. The court instructed the jury erroneously.

Jones and Hayden, for defendants in error.

I. No objection is made to the instructions in the motion for a new trial. (15 Mo. 515; 13 Mo. 215; id. 455; 26 Mo. 530.) Error in instructions can not be reached by motion in arrest. (10 Mo. 698.) The court did not err in giving or refusing instructions. (19 Mo. 102; 18 Mo. 249; 17 Mo. 382, 49; 8 Mo. 522.)

RICHARDSON, Judge, delivered the opinion of the court.

William O. Johnson and wife, in May, 1857, presented, for allowance in the county court, an account against Smith's

estate for two sums of money received respectively in 1835 and 1845 by Smith, for the use of Mrs. Johnson before her marriage. Smith died in 1855. It appears that after the death of Robert Carter, who resided in Kentucky, Smith, who was the uncle of Carter's children, one of whom is Mrs. Johnson, received for the children a small sum of money, which they had inherited from the father; and he assumed to act, without appointment, as their guardian in the management and control of the same; and, at another time, he received in like manner a small estate, which descended to Carter's children from their grand-mother who died in Virginia. Smith paid several of the children their shares; and, a short time before his death, admitted that he was indebted to Mrs. Johnson for money in his hands as her guardian. It may be assumed that Smith was never appointed guardian for Carter's children by any court or officer; for it is remarked in the brief of the plaintiff's counsel that "there is no pretence that he was a guardian *strictissimi juris*, but that he assumed to act in a fiduciary capacity." Mrs. Johnson's age is not stated, and it is not shown that she was prevented from bringing her suit sooner by reason of any statutory disability. The court in effect instructed the jury, that the plaintiff's right of action was not barred by limitations if the deceased acted as Mrs. Johnson's guardian or received the money for her while acting as such. The instruction is defended on the ground that the money was received by Smith in a fiduciary capacity, and that a trust was thereby created, which withdrew the plaintiff's demand from the operation of the statute of limitations.

The term *trust*, in its general sense, has a wide scope, and is applied to a great variety of the transactions of life. Every bailment is a trust, and the relation of trustee and *cestui que trust* is created whenever one person receives money for another's use, or engages to apply it to a particular purpose and fails to do so. In such cases a certain and ordinary remedy exists at law; and a defendant can not be denied the protection of the statute by calling him a trustee and suing

him in a court of equity. The rights or defences of parties are not altered by calling things by other names, and they are not made to depend on the forum in which the controversy may be determined. There is undoubtedly a class of trusts to which the defence of the statute of limitations can not be interposed, but such cases are distinguished by peculiar marks, and fall within the intelligible and definite rule laid down by Chancellor Kent in *Kane v. Bloodgood*, 7 John. Ch. 110, "that the trusts intended by the court of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity."

The facts in this record present nothing more than the case of one person receiving money for another's use, which could have been recovered under the common counts in an action of assumpsit for money had and received; and the essential character of the transaction was not changed by the intestate's calling himself the plaintiff's guardian. If he had been a regular guardian duly appointed, he might have retained the money until ordered by the court, from which his authority was derived, to pay it over, or until his ward became of age; but, as the facts of the case appear, he could have been compelled, at any time, at the pleasure of Mrs. Johnson, to account and pay to her all he had received.

It can not be said that there was no limitation on the right of action, and that the statute did not apply at all to the case, and, if time did not begin to run against the demand when Mrs. Johnson became of age, there is no period at which the cause of action was brought within the operation of the statute of limitations. That can not be, for this action is not distinguishable from the ordinary one of money received by one person to be paid to another, in which case limitation would begin not from the time of demand and refusal, but from the time there was a cause of action, which accrued when the money was received.

It was decided in the case of the State, to the use of Wha-

Johnson v. Holley.

ley, v. Blackwell, 20 Mo. 97, that the statute of limitations began to run in favor of an administrator against a distributee of an estate from the date of the final settlement and order of distribution. In this case there was no court in which a settlement could be made, or that could order the money in Smith's hands to be paid over; but as he was bound to pay it at any time, in our opinion the cause of action accrued when the money was received, and the statute then began to run against the plaintiff's demand unless Mrs. Johnson was under a disability.

The judgment will be reversed and the cause remanded; Judge Scott concurring. Judge Napton absent.



JOHNSON *et al.*, Defendants in Error, v. HOLLEY, Plaintiff in Error.

1. Where, in an attachment suit, in which the defendant is notified by publication and does not appear and answer, judgment by default is rendered against him, such judgment will bind only the property attached. (R. C. 1855, p. 250, § 43, 44.)
2. A judgment in an attachment suit in the following form: "It is therefore considered by the court that the said plaintiffs recover of the said defendant the sum of \$368.50 as and for their demand, and also their costs and charges herein expended; and that they have a special execution on the property attached, to-wit, lot No. 9," &c., is in substantial compliance with the statutory provisions.

Error to Buchanan Court of Common Pleas.

Loan, for plaintiff in error.

I. The judgment should have been against the property attached and not against Holley personally. (R. C. 1855, p. 256, sec. 60.)

RICHARDSON, Judge, delivered the opinion of the court.

This suit was on a promissory note commenced by attachment on the ground that the defendant was a nonresident of the state. The defendant was notified by publication, but he

Eldridge v. Steamboat William Campbell.

never appeared to the action. The judgment was in the following form: "It is therefore considered by the court that the said plaintiffs recover of the said defendant the sum of three hundred and sixty-eight dollars and fifty cents as and for their demand, and also their costs and charges herein expended, and that they have a special execution on the property attached, to-wit, lot No. 9," &c.

The only error assigned is that the judgment is a general one, when by the law it ought only to operate on the property attached. If the objection was warranted by the fact it would be fatal, for the attachment act expressly declares that when the defendant is notified by publication and does not appear, the judgment shall only bind the property and effects attached, and no execution shall issue against any other property of the defendant. (R. C. 1855, p. 251, § 43, 44.) But this judgment will be construed in reference to the record; and as it will only authorize a special *feri facias* against the attached property it is substantially good. It is in the nature of a proceeding *in rem*, and does not bind the defendant personally. It is like the form indicated in the 10th section of the mortgage act when the mortgagor is only brought in by publication. Judgment affirmed; Judge Scott concurring. Judge Napton absent.

ELDRIDGE, Plaintiff in Error, v. STEAMBOAT WILLIAM CAMPBELL, Defendant in Error.

1. A complaint against a steamboat, under the boat and vessel act, verified as follows: "A. B., attorney for plaintiff, makes oath and says he believes the foregoing petition and the matters therein as stated are true. A. B., attorney for plaintiff," is insufficiently verified.

Error to Kansas Court of Common Pleas.

Bouton, for plaintiff in error.

1. The statement was verified as required by law, the attorney Robinson being presumed to be a *credible* person. (R.

Eldridge v. Steamboat William Campbell.

C. 1855, p. 305, § 4; id. p. 1234, § 20.) The rulings in *Bridgford v. Steamboat Elk*, 6 Mo. 356, and *Hamilton v. Steamboat Iron-ton*, 19 Mo. 523, were unauthorized by the statute. The affidavit is good under the new code.

RICHARDSON, Judge, delivered the opinion of the court.

The affidavit to the complaint in this case was made by the plaintiff's attorney, and is as follows: "J. W. Robinson, attorney for plaintiff, makes oath and says he believes the foregoing petition and the matters therein as stated are true. J. W. Robinson, attorney for plaintiff." It will be observed that the affidavit does not disclose the agent's means of knowing the facts stated in the complaint; and the only question in the case is whether the affidavit is on that account defective. The point has been expressly ruled by this court in the cases of *Bridgford v. Steamboat Elk*, 6 Mo. 356, and *Hamilton v. Steamboat Iron-ton*, 19 Mo. 523. The case of *Bridgford v. Steamboat Elk* was decided in 1840, and gave a construction to the 4th section of the act concerning boats and vessels of 1835—the language of which is preserved in the corresponding section of the same act in the revisions of 1845 and 1855—and it is a legitimate conclusion that the construction given to the act by the court has received the sanction of the legislature, inasmuch as the two last revisions were made with knowledge of the decision, without changing the phraseology of the section. Furthermore, the syllabus of the cases above cited is contained in the notes appended to the 4th section by the revisers of 1855, which shows that the old law was readopted with full recognition of the construction it had received. The process against a boat, unlike an ordinary summons, commands the officer to take it into his possession, and unless bonded it is sold, with but little delay, before the suit is determined; and there is therefore some reason for requiring greater particularity and a stronger *prima facie* case for seizing a vessel than would be necessary in a suit commenced by ordinary summons.

It was remarked in the case of the *Steamboat Raritan v.*

Holmes v. McGee.

Smith, 10 Mo. 527, that, as our system of proceeding *in rem* against vessels had its origin in the maritime law, it was proper to look to that law for the principles of decision in questions not regulated by statute; and we may suppose that the court, in the case of the Steamboat Elk, intended to adopt the analogous rule that exists in some of the admiralty courts, which requires libels praying for warrants of arrest in *personam* or *in rem* to be verified by the affidavit of the libellant, and that when the affidavit is made by an agent he must state his means of knowledge of the facts sworn to. The rule of practice, which is called in question in this case, has been so long established and is so well known that we do not feel warranted in disturbing it, and the judgment will therefore be affirmed; Judge Scott concurring. Judge Napton absent.

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HOLMES, Plaintiff in Error, v. MCGEE, Defendant in Error.

1. In an action for partition the plaintiff alleged that himself and defendant were joint owners of a certain tract of land; that they were "equal partners" in the same; that the said tract had been divided into town lots, a part of which had been sold; that the residue of the lots were the joint property of the plaintiff and defendant; and prayed for partition of said remaining lots. The court sustained a demurrer to this petition. *Held*, that the demurrer was improperly sustained; that if the plaintiff and defendant held the land as partners and the affairs of the partnership were unadjusted, the land being chargeable with debts of the firm, or with a balance due the defendant, this matter should be set up in an answer; that, no such defence being interposed, partition might be made of the lots remaining unsold.

Error to Kansas Court of Common Pleas.

E. B. Ewing, for plaintiff in error.

I. No facts are averred in the petition showing a partnership between the parties to the suit. The words "equal partners" denote the share or extent of interest of each of the parties. If the land is partnership property, it still may be partitioned. The legal title is vested in plaintiff and defendant jointly.

Holmes v. McGee.

Hovey, for defendant in error.

I. The plaintiff seeks to convert a regular petition for account and settlement of a partnership transaction into a statutory action for partition. The petition gives no description of the "premises sought to be divided." (R. C. 1855, p. 1111, § 3.)

RICHARDSON, Judge, delivered the opinion of the court.

This was a proceeding for partition. The petition states that the plaintiff and defendant are the joint owners of a tract of forty acres of land, conveyed to them by Riddlesberger, and that they are "equal partners" in the same, that the tract had been subdivided into town lots, a designated number of which had been sold; and that the residue of the lots were the joint property of the plaintiff and defendant, of which partition was asked. A demurrer was filed and sustained on the ground that it appeared from the petition that the parties were partners in the land, and it was not averred that the partnership had been dissolved or that the partnership debts had been paid; and also because the land having been laid off into lots, blocks and streets, the plaintiff had no right to partition of the original tract.

If the land was partnership property, it would be treated as between the partners like personal property, chargeable with the debts of the firm and with any balance due from one to the other upon the winding up of the affairs of the firm; (Carlisle's Adm'r v. Mulhern, 16 Mo. 56; Duhring v. Duhring, 20 Mo. 174;) and the plaintiff could not by a partition proceeding deprive the defendant of any equitable liens so long as a balance remained due to him or the partnership debts were unpaid. But if all the partnership debts had been paid, and the equitable claims of the parties had been adjusted, there is no reason why the land, though originally partnership property, should not be treated as real estate and subject to all the ordinary incidents of land held by tenants in common.

State v. Hopper.

The expression in the petition "equal partners" does not seem to have been used in a technical sense for the purpose of describing the nature of the title by which the land was held, but as indicating the extent of the interest of the parties; and that expression is not sufficient of itself to authorize the legal conclusion that the plaintiff and defendant were partners, or that they held the property as such. The defendant ought to have answered, setting out all the facts from which it could have been determined whether the plaintiff was entitled to partition.

If the land had been laid off into town lots, of course only those remaining unsold could have been divided, and the partition would have been made in reference to the subdivisions and not according to the original tract.

Judge Scott concurring, the judgment will be reversed and the cause remanded. Judge Napton absent.



THE STATE, Plaintiff in Error, v. HOPPER *et al.*, Defendant
in Error.

1. An indictment, under section 30 of article 8 of the act concerning crimes and punishments (R. C. 1855, p. 630), charging that the defendants unlawfully did disturb a congregation and assembly of people met for religious worship, by wilfully behaving in a rude and indecent manner and using profane discourse within the place of worship of said congregation, is bad; the offence should be charged to have been done wilfully, maliciously or contemptuously.

Error to Johnson Circuit Court.

Ewing, (attorney general,) for the State.

- I. The indictment sufficiently describes the offence. (United States v. Batchelder, 2 Gall. 18; State v. Bullock, 13 Ala. 416; Thompson v. People, 3 Parker C. Cas. 214; 6 Verm. 594; Whart. C. L. 190; Barb. C. L. 333; 16 Mass. 385; 6 Saund. 135.)

Davis v. Slagle.

Ryland & Son, for defendants in error.

I. The indictment is bad. (State v. Bankhead, 25 Mo. 558.)

RICHARDSON, Judge, delivered the opinion of the court.

It was intended to charge the defendants under the 30th section of article 8 of the act concerning crimes and punishments, (R. C. 1855, p. 630,) which declares that "every person who shall wilfully, maliciously or contemptuously disturb or disturb any congregation or assembly of people met for religious worship, by making a noise, &c., shall be punished," &c. The indictment charges that the defendants unlawfully did disturb a congregation and assembly of people met for religious worship by wilfully behaving in a rude and indecent manner, and using profane discourse within the place of worship of said congregation.

The offence defined by the statute is not charged in the indictment; for the offence does not consist simply in disquieting or disturbing a congregation, but in doing it wilfully, maliciously or contemptuously. Neither the words of the statute descriptive of the offence nor equivalent words are used. (1 Chit. C. L. 281.)

The motion to quash was properly sustained, and the judgment will be affirmed; Judge Scott concurring. Judge Napton absent.

DAVIS, Respondent, v. SLAGLE, Appellant.

1. A petition, in an action for breach of promise of marriage, alleging that about a certain specified date, "the defendant—in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant—did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that though a reasonable time

Davis v. Slagle.

has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused, and still does neglect and refuse," &c., is good after verdict on motion in arrest of judgment.

2. Where a defendant, in an action for breach of promise of marriage, attempts in his answer to justify his noncompliance with his contract by charging that the character of the plaintiff for virtue is bad, the fact that this imputation is unwarrantably made is a circumstance that aggravates the damages; and the jury may take the same into consideration in estimating the damages.

Appeal from Livingston Circuit Court.

The following are the instructions referred to in the opinion of the court: "1. That if the jury believe from the evidence that plaintiff and defendant contracted to marry each other and that defendant failed and refused to marry plaintiff, they must find for the plaintiff. 2. That the pleadings in this case admit that defendant refused and failed to marry plaintiff. 3. That in this case if the jury believe there was a contract between plaintiff and defendant to intermarry, they must find for plaintiff. 5. That in assessing the damages the jury are not limited to the mere pecuniary damage which the plaintiff may have sustained, but may take into consideration the injury to her feelings, character and reputation, and may in this case find for the plaintiff such amount, not exceeding five thousand dollars, as they may believe from the facts and circumstances the case requires."

Harris, for appellant.

I. The petition does not state facts sufficient to constitute a cause of action. An offer to perform the contract must be averred. That plaintiff was ready and willing and requested defendant to marry her, is not sufficient. (2 Bibb, 341; 13 B. Mon. 465; 2 Saund. on Plead. & Ev. 348; Green v. Spencer, 3 Mo. —.) The failure to aver and offer by plaintiff and an appointment of time and place is not cured by the verdict, but may be taken advantage of by motion in arrest, or an error or appeal. (Fible v. Caplinger, 13 B. Mon.

Davis v. Slagle.

485; *Mooney v. Kennett*, 19 Mo. —; 7 Barb. 581; 19 Barb. 186; 3 Seld. 464; 4 How. 155.) The first, second and third instructions are erroneous. The fifth instruction is erroneous. Injury to character is not a subject of damages in an action for breach of promise of marriage. Character is not involved in such an action. (*Leckey v. Blosey*, 24 Penn. 401.) If such damages can be recovered under any circumstances, it could only be when they are specially charged in the petition. (*Bedell v. Powell*, 13 Barr, 183.)

Davis, for respondent.

I. The character of the plaintiff was directly in issue on the trial. The instructions to take into consideration her character and reputation were properly given. (1 Greenl. Ev. § 54; 1 Cow. & Hill's notes, 456; *Chitty on Contr.* 475; 6 Cow. 254; 13 Mo. 16.)

RICHARDSON, Judge, delivered the opinion of the court.

This was an action to recover damages for a breach of promise of marriage. The petition averred that about the 15th December, 1857, "the defendant, in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant, did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that, though a reasonable time has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused and still does neglect and refuse," &c. There was no demurrer, and the first question arises as to the sufficiency of the petition on the motion in arrest of judgment.

It is objected that the petition is fatally defective in omitting the averment of a special request or an offer by the

Davis v. Slagle.

plaintiff to perform the contract on her part. It is a general rule that in contracts requiring mutual and concurrent acts to be performed at the same time, neither party can maintain an action against the other without showing that he has performed or offered to perform his part of the agreement; but in actions of this kind a declaration like the one in this case has been held after verdict to be good. In *Seymour v. Gartside*, 2 Dow. & Ry. 55, the declaration was substantially like this petition, which averred "that plaintiff, confiding in the promise, had always remained unmarried, and was still ready and willing to marry the defendant; and that although a reasonable time for the defendant to marry the plaintiff had elapsed, yet the defendant, not regarding his promise, did not nor would within such reasonable time marry the plaintiff, but had hitherto wholly neglected and refused so to do." It was held by the court of king's bench that the declaration after verdict was sufficient, without averring that the defendant had any notice of the plaintiff's readiness, or averring any request made to the defendant to marry the plaintiff, or any averment of a special refusal. (2 Saund. Pl. & Ev. 347.)

There was no error in giving the first, second and third instructions, because it was admitted in the answer that the defendant had refused to marry the plaintiff, and the allegation in the petition that a reasonable time had elapsed for the defendant to marry the plaintiff was not denied in the answer.

The defendant attempted in his answer to excuse his abandonment of the plaintiff by stating on the record that her character for virtue was bad. The plaintiff was allowed without objection to repel by proof this assault on her reputation, and as the defendant entirely failed to show any thing against it, the imputation on her virtue, deliberately made and sworn to, was a circumstance that aggravated the damages. (*Southard v. Rexford*, 6 Cow. 254.) A nominal verdict would have endorsed the slander and ruined her reputa-

Davis v. Slagle.

tion, and the jury under the circumstances of this case were properly told in the fifth instruction to take into consideration, in estimating the damages, the injury to the plaintiff's character. With the concurrence of Judge Scott, the judgment will be affirmed. Judge Napton absent.

[CONTINUED TO VOL. XXVIII.]

INDEX.

A

ABANDONMENT.

See DEDICATION TO THE PUBLIC.

ACCOUNT.

See PRACTICE, 81.

ACKNOWLEDGMENT OF DEEDS.

See EVIDENCE, 11, 12. CONVEYANCE.

ACTION FOR USE AND OCCUPATION.

1. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied. *Cohen v. Kyler*, 122.

ADMINISTRATOR'S BOND.

1. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond. *The State, to use, &c., v. Holt*, 340.

ADMINISTRATION.

See RELEASE, 3.

1. Where a judgment is rendered against a person in his lifetime it need not be allowed as a demand against his estate; a transcript of the judgment may be filed in the probate court and the court should determine its class. *Carondelet v. Desnoyer's Adm'r*, 36.
2. Although an appeal will lie from an order of a probate court revoking letters of administration, yet, where the revocation is made for the reason that a will had been found and admitted to probate, the circuit court can not on such appeal inquire into the sufficiency of the proof upon which the probate court acted in granting probate of the will. *In re, Milton Duty's Estate*, 43.
3. The validity of a will duly proven can be contested only in a proceeding instituted for that purpose under section 30 of the act concerning wills (R. C. 1845, p. 1083; R. C. 1855, p. 1571, sec. 30); an appeal will not lie from an order of a probate court granting probate of a will. *Id.*
4. A surviving partner retained possession of the partnership effects and

ADMINISTRATION—(Continued.)

- gave bond under sections 50 and 51 of the first article of the administration act of 1845 (R. C. 1845, p. 70); a settlement was made by him in the probate court and an order was made by said court apportioning to the estate of the deceased partner one-half of the balance found to be in the hands of such surviving partner. *Held*, in an action on the bond to recover a debt due to the deceased partner for money advanced by him to the firm, that this settlement was not conclusive as against his estate as to the amount due thereto from the surviving partner, or as to the amount of assets in the hands of the latter. *The State, to use, &c., v. Baldwin*, 103.
5. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond. *The State, to use, &c., v. Holt*, 340.
 6. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward. *Mitchell v. Williams*, 399.
 7. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian. *Id.*
 8. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Madden's heirs v. Madden's Adm'r*, 544.
 9. The fifty-sixth section of the act of July 4, 1807, (1 Terr. Laws, p. 138,) authorized the sale, under the order of the general court, of an intestate's estate for the payment of his debts, although he left no lawful issue. *Blair v. Marks*, 579.
 10. The administrator was, in the case of such a sale, authorized to make a deed to the purchaser. *Id.*
 11. After the lapse of forty or fifty years from the date of such a sale, proof of the advertisements and other prerequisites of a legal sale could not be insisted on. *Id.*

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See COVENANT. RELEASE. INSURANCE. COMMON CARRIER. ARBITRATION. BREACH OF PROMISE OF MARRIAGE.

1. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (*Johnson v. McCune*, 21 Mo. 211, affirmed.) *Johnson's Adm'r v. McCune*, 171.
2. Where there is a special contract to do certain work and the contractor fails to perform the work according to the terms of the contract, no recovery can be had by him on the contract. *Lowe v. Sinklear*, 308.

AGREEMENT—(Continued.)

3. If, however, services are rendered by him which are of value to the person with whom he contracts and are accepted by such person, an obligation is thereby created to pay the reasonable value of such services, not exceeding the contract price, taking into consideration and making allowance for any damage resulting from the breach of the contract. *Id.*
4. If a minor enter into a special contract to do certain work, he may avoid such contract and may recover a reasonable compensation for the work done, the damage resulting from the avoiding of the contract being taken into consideration and allowed. *Id.*
5. A contractor engaged in the performance of certain work may assign to another the money to be due to him on its performance. *Leahy v. Dugdale's Adm'r*, 437.
6. At law there will be no implication of a promise on the part of a step-daughter to pay her step-father for necessities furnished by the latter during the minority of the former. *Gillett v. Camp*, 541.
7. A. agreed to deliver to B. at a specified place on the Mississippi river "two rafts of pine logs containing each from 350,000 to 400,000 feet, more or less—one raft to be of the first run in the spring, and the other as soon thereafter as possible (want of sufficient water and dangers of navigation excepted); and in case of a loss of a portion of said rafts the loss to be deducted *pro rata* as per number of logs contained in the whole." A. brought to the place specified a raft containing 419,226 feet; he cut off and delivered to B. 323,385 feet of this raft, B. demanding the whole raft. *Held*, in a suit by B. to recover damages of A. for his refusal to deliver the whole raft, 1st, that B. was not entitled under the contract to demand the whole raft of 419,226 feet, the words "more or less" not covering so great an excess as 19,226 feet; that the delivery of a raft containing any quantity of logs between 350,000 and 400,000 feet would be a legal compliance with the contract; 2d, that it was competent for A. to show that when the raft in question started from his boom in Minnesota, it contained, according to the St. Croix scale and measurement, 486,402 feet of logs, and that 67,176 feet were lost, by reason of want of water and dangers of navigation, in running it to its place of destination. *Patterson v. Judd*, 561.

ALLOCATION.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

ALTERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

AMENDMENTS.

See PRACTICE, 18.

APPEAL.

See COUNTY COURTS.

1. An appeal will lie to a circuit court from an order of a county court removing the guardian of an insane person. *Hall v. Audrain County Court*, 329.

APPEAL—(Continued.)

2. In perfecting such an appeal, an affidavit and appeal bond or recognizance are not required. *Id.*
3. A mandamus will lie in such case from the circuit court to the county court requiring it to grant an appeal, although a writ of error might have been resorted to. *Id.*
4. An appeal to the supreme court must be made, under the revised code of 1855, during the term at which the judgment or decision appealed from is given; it can not be made before the clerk in vacation. (R. C. 1855, p. 1287, sec. 11.) *Stavely v. Kunkel*, 422.

ARBITRATION.

1. An agreement to refer a matter in dispute to arbitrators can not be specifically enforced. *King v. Howard*, 21.
2. When an agreement to submit a matter in dispute to arbitration describes the subject of dispute thus: "A matter in difference between the parties;" and the parties afterwards appear before the arbitrators and litigate a matter without any denial that it is the subject of dispute between them, they should not afterwards be heard objecting to the vagueness and indefiniteness of the agreement. *Price v. White*, 275.
3. Where a notice is given that a motion will be presented to a court on the first Monday of May for the confirmation of an award, and the legislature afterwards changes the time of holding said court from the first to the second Monday, the notice will be sufficient; the party to whom the notice is given must take notice of the change. *Id.*
4. An umpire, chosen by arbitrators upon their own disagreement to decide the matter submitted to arbitration, must be sworn before he can hear the evidence in the cause. *Frissell v. Fickes*, 557.
5. Where a matter in dispute is submitted to arbitrators with a power on their part in case of a disagreement to call in an umpire, the umpire may be appointed before the arbitrators commence their investigation, or at any stage of the proceedings; he ought to see and hear the witnesses. *Id.*
6. It does not invalidate an award that the arbitrators join with the umpire in making the same. *Id.*
7. Where in a submission to arbitration the matter in dispute is stated to be the "taking of a quantity of timber from the land" of the plaintiffs, the arbitrators would not be authorized to assess treble damages. *Id.*

ASSAULT.

1. If one having a gun in his hands raises it to a level and directs it towards, but not directly at, another, and threatens to kill him if he advances in a certain direction, it will constitute an assault; it is not necessary that the gun should be raised to the shoulder. *The State v. Epperson*, 255.

ASSIGNMENT.

See AGREEMENT. INSURANCE, 3. SALE.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. Assignments for the benefit of a portion of the creditors of the assignor

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—(*Continued.*)

are valid notwithstanding section 39 of the act concerning voluntary assignments; that section operates to overthrow all provisions in assignments giving preferences among the designated creditors. *Woods v. Timmerman's Assignee*, 107.

2. A provision in an assignment providing for the payment of a particular debt of a designated creditor would be valid. *Id.*
3. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors that it is the intent of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned and to dispose of the same in the usual course of business until default, such deed of assignment should be held to be a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors. *Stanley v. Bunce*, 269.
4. It is not necessary that the deed of assignment should expressly provide that the grantor should remain in possession and continue to dispose of the goods in the usual course of business; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. *Id.*
5. The term "voluntary," as applied to conveyances within the act concerning voluntary assignments (R. C. 1852, p. 202), means *voluntary* as opposed to *compulsory*; a conveyance to a creditor in trust for himself as well as the other creditors of the assignor is a voluntary assignment within the meaning of said act. *Manny v. Logan*, 528.

ASSUMPSIT.

See AGREEMENT. BREACH OF PROMISE OF MARRIAGE.

ATTACHMENT.

See JUSTICES' COURTS. EVIDENCE, 15.

1. A justice of the peace, under section 21 of the second article of the attachment act of 1845 (R. C. 1845, p. 151), ordered the sale of a wood-boat in the custody of a constable under a writ of attachment issued by said justice. *Held*, that, on a final determination of the attachment suit adversely to the plaintiff therein, the defendant would be entitled to the entire proceeds of the sale of the boat, and might recover the same from the constable, although no order had been made by the justice with respect thereto. *Snead v. Wegman*, 176.
2. Any sum that might be allowed the constable, under section 45 of the second article of the attachment act of 1845, as compensation for his trouble and expense in keeping the boat, should be taxed as costs in the cause and would fall on the unsuccessful party; the constable would not have a lien on the proceeds of the sale of the boat for the necessary expenses of keeping and selling it. *Id.*
3. Only the interest of the defendant in the attachment could be attached and sold; hence he alone could sue the constable for the proceeds of the sale of the boat. *Id.*
4. To entitle a garnishee to indemnification for expenses incurred by him,

ATTACHMENT—(*Continued.*)

- it is not necessary that he should appear and answer in the garnishment proceeding. *Bain v. Chrisman*, 298.
5. Where, in an attachment suit, in which the defendant is notified by publication and does not appear and answer, judgment by default is rendered against him, such judgment will bind only the property attached. (R. C. 1855, p. 250, § 43, 44.) *Johnson v. Holley*, 594.
 6. A judgment in an attachment suit in the following form: "It is therefore considered by the court that the said plaintiffs recover of the said defendant the sum of \$368.50 as and for their demand, and also their costs and charges herein expended; and that they have a special execution on the property attached, to-wit, lot No. 9," &c., is in substantial compliance with the statutory provisions. *Id.*

ATTORNEY AT LAW.

See INFANCY.

1. Communications made to an attorney at law as such are privileged, and the attorney can not be permitted to testify concerning them without the consent of the client. This rule applies to the case where two persons, having hostile interests, consult the same attorney, at the same time, with respect to the matter in dispute, and one of such parties calls upon the attorney to testify with respect to the declarations and admissions made by the other at the consultation. *Hull v. Lyon*, 570.
2. Whether a communication is a privileged one is a question for the court. *Id.*

ATTORNEY IN FACT.

See MORTGAGE, 7.

AWARD.

See ARBITRATION.

B

BAILMENT.

See COMMON CARRIER.

1. To authorize the lender of a chattel to recover its value of the borrower, it must appear that it has been lost or destroyed through the negligence of the latter or has been converted to his use; there can be no recovery as for a conversion of the chattel, where the evidence merely shows that there was a loan and a failure on the part of the borrower to return the thing borrowed; a demand must be shown. *Ross v. Clark*, 549.

BANK OF MISSOURI.

See CORPORATION, 1.

BANKRUPT'S DISCHARGE.

See INSOLVENT LAWS.

BILL OF LADING.

See COMMON CARRIER.

BILLS OF EXCEPTIONS.

See PRACTICE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See MORTGAGE.

1. A material alteration of a promissory note or bill of exchange will render the same invalid, even in the hands of an innocent holder, as against any party thereto not consenting to the alteration. *Trigg v. Taylor*, 245.
2. This rule applies to an accommodation note fraudulently altered before it is negotiated. *Id.*
3. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof. *Thomson v. Roateap*, 283.
4. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.) *Phillips v. Riley*, 386.
5. A promissory note given by one partner in the name of the firm is binding, *prima facie*, upon all the partners; if the note be given for the individual debt of the partner executing the same, or for an indebtedness created in relation to a matter known to be foreign to the business of the partnership, the partnership is not bound. It devolves upon the partners, in order to escape liability, to show these facts. *Hickman v. Kunkle*, 401.
6. A suit on a promissory note by an assignee against the maker is triable at the first term, although the assignment is denied. *Armstrong v. Johnson*, 420.
7. Fraud in the consideration of a negotiable promissory note is no defence to an action thereon by an endorsee to whom the same was endorsed before maturity without notice. *Jaccard v. Shands*, 440.
8. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Price*, 505.
9. The character of a notice to endorsers of the dishonor of a promissory note may be proven by parol testimony. A notice to produce the notice is not necessary. *Johnston v. Mason*, 511.
10. A., a citizen of and residing in the state of Missouri, sold goods to B., who also at the time of the sale resided in said state; B. gave his note to A. for the indebtedness thus incurred; B. afterwards went to and became a citizen of California; A. transmitted said note to one C., an attorney at law in California, for collection; C., deeming it for the interest of A., surrendered said note to B., and received in renewal thereof another note from B.; this note was made payable to the order

BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

of "C., attorney of A.;" while this note remained in the hands of C., B. obtained a discharge therefrom under the insolvent law of California; C. afterwards endorsed the note to A. in Missouri, who commenced a suit thereon against B. *Held*, that the discharge under the insolvent law of California could not be regarded as a valid discharge by the law of this state. *Crow v. Coons*, 512.

BOATS AND VESSELS.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of. *Adams v. Wiggins Ferry Co.*, 95.
2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence. *Id.*
3. The act concerning boats and vessels (R. C. 1845, p. 180) applies to boats and vessels owned in sister states as well as to those owned in Missouri. (*Yore v. Steamboat C. Bealer*, 26 Mo. 426, affirmed.) *Wood v. Steamboat Fleetwood*, 159.
4. Where the rate of freight inserted in a dray ticket is "30 cents per hundred" and the clerk of a steamboat signs the same by mistake or oversight, and the shipper of the goods at the time he puts the same on board for transportation has no knowledge of the mistake, and when it is discovered refuses to pay a higher rate of freight and demands his goods of the boat, and its officers fail to re-deliver the same, and transport them to their place of destination, they will not be entitled to demand in behalf of the boat more than 30 cents per hundred. *Id.*
5. Where a complaint filed against a steamboat to enforce a lien for wages states "that thirty days have not elapsed since the demand for services accrued to him," and is accompanied by an affidavit to the effect that the demand sought to be enforced "is the only demand that he [complainant] has against said steamboat;" such complaint is sufficient. *Byrne v. Steamboat St. Mary*, 296.
6. The forty-second section of the act concerning boats and vessels (R. C. 1855, p. 313), providing that suits to enforce liens in any other than the first class shall, in St. Louis county, be commenced within six months, does not apply to causes of action that had accrued more than six months previous to the 1st of May, 1856—the day the revised code of 1855 went into effect. *Ridgley v. Steamboat Reindeer*, 442.
7. Suits instituted in the St. Louis court of common pleas are triable at the return term "in all cases in which the parties continued to be proceeded against at such term shall have been personally summoned for at least fifteen days before the first day of such term;" (R. C.

BOATS AND VESSELS—(Continued.)

1855, p. 1595;) inquiry of damages may be made at the return term in a case of judgment of default against a steamboat. *Id.*

8. A complaint against a steamboat, under the boat and vessel act, verified as follows: "A. B., attorney for plaintiff, makes oath and says he believes the foregoing petition and the matters therein as stated are true. A. B., attorney for plaintiff," is insufficiently verified. *Eldridge v. Steamboat William Campbell*, 595.

BONA FIDE PURCHASER.

See VENDORS AND PURCHASERS. MORTGAGE. CONVEYANCE.

BOND.

See GUARDIAN'S BOND. ADMINISTRATOR'S BOND. INDEMNIFICATION BOND.

BORROWER.

1. To authorize the lender of a chattel to recover its value of the borrower, it must appear that it has been lost or destroyed through the negligence of the latter or has been converted to his use; there can be no recovery as for a conversion of the chattel, where the evidence merely shows that there was a loan and a failure on the part of the borrower to return the thing borrowed; a demand must be shown. *Ross v. Clark*, 549.

BREACH OF PROMISE OF MARRIAGE.

1. A petition, in an action for breach of promise of marriage, alleging that about a certain specified date, "the defendant—in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant—did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that though a reasonable time has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused, and still does neglect and refuse," &c., is good after verdict on motion in arrest of judgment. *Davis v. Slagle*, 600.
2. Where a defendant, in an action for breach of promise of marriage, attempts in his answer to justify his noncompliance with his contract by charging that the character of the plaintiff for virtue is bad, the fact that this imputation is unwarrantably made is a circumstance that aggravates the damages; and the jury may take the same into consideration in estimating the damages. *Id.*

CARONDELET.

See LANDS AND LAND TITLES.

CERTIFICATE OF PROOF OF DEEDS.

See CONVEYANCE, 8.

CERTIORARI.

1. *Quere*, when may writs of *certiorari* issue from the supreme court, and what is the proper office and function of such writs? *Hannibal & St. Joseph Railroad Co. v. Morton*, 317.

CHANCERY PRACTICE.

See EQUITY, 5. PRACTICE, 52.

CHARTER.

See CORPORATION. CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

CHILD.

See PARENT AND CHILD.

CLERICAL ERROR.

See CRIMES AND PUNISHMENTS, 10.

COLLISION.

See BOATS AND VESSELS.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of. *Adams v. Wiggins Ferry Co.*, 95.
2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence. *Id.*

COMITY.

See INSOLVENT LAWS.

COMMON.

See LANDS AND LAND TITLES.

1. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town. *McDonald v. Schneider*, 405.
2. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town. *Id.*
3. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation? *Primm v. Haren*, 205.
4. The United States survey of Carondelet common includes private claims; hence, it would be erroneous to rule that twenty years' claim and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who

COMMON—(Continued.)

seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812. *Id.*

5. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto. *Id.*

COMMON CARRIER.

See BAILMENT.

1. Where one of several companies engaged in transporting goods on the line of a route between two distant points receives goods from another of those companies, and, in accordance with the usual custom in such cases and in ignorance of any special contract made with the company first receiving the goods, pays the freight and charges demanded at the point where they are so received and transports them to their place of destination: *Held*, there being no arrangement or understanding between the companies with reference to "through" transportation, that the company might retain possession of the goods until the consignee should pay its own customary charges for transportation, together with the freight and charges paid by it on its receipt of the goods, although such sum should exceed the amount for which the company that first received the goods agreed they should be transported. *Wells v. Thomas*, 17.
2. Where the rate of freight inserted in a dray ticket is "30 cents per hundred" and the clerk of a steamboat signs the same by mistake or oversight, and the shipper of the goods at the time he puts the same on board for transportation has no knowledge of the mistake, and when it is discovered refuses to pay a higher rate of freight and demands his goods of the boat, and its officers fail to re-deliver the same, and transport them to their place of destination, they will not be entitled to demand in behalf of the boat more than 30 cents per hundred. *Wood v. Steamboat Fleetwood*, 159.
3. Where there is a privilege of reshipping reserved in a bill of lading, the carrier will be liable for any loss occurring on the boat on which the goods are reshipped, if under like circumstances he would have been liable had the loss occurred on his own boat. *Carr v. Steamboat Michigan*, 196.
4. The reservation in a bill of lading of the "privilege of reshipping" confers only the right of transferring the goods shipped to another boat or vessel for the purpose of being transported to the port of destination; it will not authorize the temporary storing of the goods on a wharf-boat at the point of reshipment; nor will the carrier, in order to escape liability for the loss of the goods while stored on a wharf-boat at Cairo with a view to reshipment to St. Louis, be permitted to show that "the usual and customary mode of reshipping was to place the cargo on wharf-boats at Cairo, to be taken therefrom by other boats bound for St. Louis." *Id.*

COMMON CARRIER—(*Continued.*)

5. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence. *Holtzclaw v. Duff*, 392.
6. Where a common carrier engages to carry goods to a certain point, the terminus of the road, and there to deliver them on board a steamboat, the liability of a common carrier continues only until the arrival of the goods at the terminus of the road, and the liability of a warehouseman and forwarding agent then commences; if the goods are damaged while deposited on the levee awaiting the arrival of a steamboat, the owner can recover only for loss occasioned by negligence. *Id.*

CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

1. Where, in proceedings instituted in behalf of the Hannibal and St. Joseph Railroad Company, under its charter, to obtain the condemnation and appropriation of land upon which said railroad had been located, it was stated, in the report of the viewers appointed to assess the damages, that before proceeding to examine the damages they took the oath prescribed by the statute, but the oath itself was not set forth; *held*, it not appearing that any objection was made to the report on this ground, that the recital in the report was sufficient to show that the required oath had been taken. *Hannibal & St. Joseph Railroad Co. v. Morton*, 317.
2. The supreme court would not in such case quash the proceedings for the reason that the record thereof does not show affirmatively that the viewers were citizens of the county. *Id.*
3. The charter of the company not making any provision for bills of exceptions in such cases, they could not be taken; if taken, they would form no part of the record. *Id.*
4. The supreme court could not, in such case, quash the proceedings on the ground that the damages allowed by the commissioners were inadequate. *Id.*
5. Private property can not constitutionally be condemned and appropriated by the legislature to private use. *Dickey v. Tennison*, 373.
4. The "act to establish a neighborhood road in Washington county, approved December 8, 1855, (Sess. Acts, 1855, p. 466,) is unconstitutional. *Id.*
7. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void. *Id.*

CONDITIONAL SALE.

See MORTGAGE. VENDORS AND PURCHASERS.

1. The test by which to determine whether a transaction is a mortgage or a conditional sale is this: if the relation of debtor and creditor remains and a debt still subsists between the parties, it is a mortgage; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases by a given time and thereby entitling himself to a reconveyance, it is a conditional sale. *Slowe v. McMur-ray*, 113.

CONDITIONAL SALE—(*Continued.*)

2. If the transaction is a conditional sale, the party seeking a reconveyance to himself must strictly comply with the conditions imposed upon him.
3. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds. *Clawwater v. Tetherow*, 241.

CONDITIONS.

See AGREEMENT. INSURANCE.

CONDONATION.

See DIVORCE.

1. After a husband or wife has been wronged in such a manner as would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offence. *Twyman v. Twyman*, 383.

CONFIRMATIONS.

See LANDS AND LAND TITLES.

CONSTABLE.

1. A justice of the peace, under section 21 of the second article of the attachment act of 1845 (R. C. 1845, p. 151), ordered the sale of a wood-boat in the custody of a constable under a writ of attachment issued by said justice. *Held*, that, on a final determination of the attachment suit adversely to the plaintiff therein, the defendant would be entitled to the entire proceeds of the sale of the boat, and might recover the same from the constable, although no order had been made by the justice with respect thereto. *Snead v. Wegman*, 176.
2. Any sum that might be allowed the constable, under section 45 of the second article of the attachment act of 1845, as compensation for his trouble and expense in keeping the boat, should be taxed as costs in the cause and would fall on the unsuccessful party; the constable would not have a lien on the proceeds of the sale of the boat for the necessary expenses of keeping and selling it. *Id.*
3. Only the interest of the defendant in the attachment could be attached and sold; hence he alone could sue the constable for the proceeds of the sale of the boat. *Id.*
4. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.) *Miller v. Wall*, 440.

CONSTITUTIONAL LAW.

See BOATS AND VESSELS, 3.

1. It is no infringement of that provision of the constitution giving the accused the right in all criminal prosecutions to meet the witnesses

CONSTITUTIONAL LAW—(Continued.)

- against him face to face to receive in evidence, against the defendant in a criminal prosecution, a deposition taken before the committing magistrate in the presence of the accused—the deponent being dead at the time of trial. *The State v Harman*, 120.
2. So long as goods imported into one of the United States from a foreign country remain in the original unbroken package, the importer may sell the same, in that form, without first taking out a license from the state authorities; a state law requiring him first to take out a license would be in conflict with the constitution of the United States. *The State v. Shapleigh*, 344.
 3. The act to tax and license merchants, approved December 11, 1855 (R. C. 1855, p. 1072), does not, when properly construed, require the importer of foreign goods to take out a license to authorize him to sell the same in the original packages. *Id.*
 4. Private property can not constitutionally be condemned and appropriated by the legislature to private use. *Dickey v. Tennison*, 373.
 5. The "act to establish a neighborhood road in Washington county," approved December 8, 1855, (Sess. Acts, 1855, p. 466,) is unconstitutional. *Id.*
 6. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, is void. *Id.*
 7. No state has power, under the constitution of the United States, in the exercise of its taxing power, to discriminate in favor of its own manufactures and productions and against those of its sister states. Such a discriminating tax, whether levied on the goods and manufactures of sister states in the original unbroken bale or package in which they are brought into the state, or upon the same after they have become incorporated into the mass of property of the state, would be unconstitutional and void. *The State v. North & Scott*, 464.
 8. As a state can not, by a direct tax on the manufactures and productions of sister states, discriminate against them, so it can not accomplish such a result indirectly by requiring a merchant dealing in such manufactures to take out a license and pay a tax thereon, while it levies no such tax upon merchants dealing in articles of its own manufacture and growth. *Id.*
 9. The act to tax and license merchants, approved December 11, 1855, (R. C. 1855, p. 1072), so far as the same required merchants dealing in the manufactures of sister states to take out licenses from the state authorities and to pay a tax on the same, is unconstitutional and void. (NAPTON, Judge, dissenting.) *Id.*
 10. A state law requiring an importer of foreign goods, who sells the same in the original unbroken package, to take out a license from the state authorities and to pay a tax on the same, would be unconstitutional. *Id.*
 11. The provision of the constitution of the state of Missouri which declares that all property subject to taxation shall be taxed in proportion to its value does not require that all the property in the state shall be

CONSTITUTIONAL LAW—(Continued.)

taxed, but that when any species of property is selected for taxation it shall be taxed in proportion to its value. *Id.*

12. That provision of the constitution of the state of Missouri, which requires all property subject to taxation to be taxed in proportion to its value, is applicable only to taxation in its usual, ordinary and received sense, to taxation for general state, county, city and town purposes, not to local assessments, where the money raised is expended on the property taxed. *Egyptian Levee Co. v. Hardin*, 495.
13. The act of February 27, 1855, (Sess. Acts, 1855, p. 73; also Adj. Sess. 1855, p. 28,) authorizing the Egyptian Levee Company, thereby incorporated, for the purpose of reclaiming a certain district from inundation by leveeing, ditching and embanking, to levy a tax *per acre* (not exceeding fifty cents) upon the land owners within said district, is constitutional; it is not in conflict with that provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Id.*

CONSTRUCTION.

See AGREEMENT. INSURANCE. CONVEYANCE. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

CONVEYANCE.

See LAND AND LAND TITLES. EVIDENCE.

1. The doctrine of presuming conveyances rests mainly upon long and uninterrupted possession in the owners of the title in favor of which the presumption is indulged; if this possession be had, not under the title in favor of which such a presumption is invoked, but under another title not shown to be owned by the person so invoking it, a conveyance will not be presumed to supply the defect. *Dessaunier v. Murphy*, 48.
2. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, 198.
3. A deed conveyed all the interest of the grantor in his father's estate or lands "near St. Louis;" *held*, that it might be shown that the father possessed land nearer St. Louis, and more appropriately within the description of the deed of the son, than that sought to be comprised within it. *Id.*
4. Where the possession of land by a party in whose favor it is sought to invoke the presumption of a deed is entirely consistent with title in another—as where a father (in whose behalf the presumption is invoked as against his son and the son's heirs) is in possession of land during the minority of the son, or after the death of the son, at which time the law devolved a life interest in the land of the son upon the father—such possession will not authorize the presumption of a conveyance. *Watson v. Bissell*, 220.

CONVEYANCE—(Continued.)

5. Under the general law of the state certified copies of deeds of conveyance may be received in evidence upon proof that the originals are not "within the power" of the party offering such copies—that is, not within his control or possession, nor in the possession of his agent, servant or bailee. *Barton v. Murrain*, 235.
6. Where, however, deeds conveying portions of the military bounty land in this state are executed in other states of the Union, and acknowledged and proved in accordance with the laws and usages of such states and not in accordance with the law of this state, certified copies of such deeds can be read in evidence only upon proof of the loss or destruction of the original. *Id.*
7. The loss of such instruments should be presumed if it appear that search has been made in the proper places and by the proper persons, and that they can not be found after due diligence has been used in looking for them. *Id.*
8. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.) *Allen v. Moss*, 354.
9. Under the act of July 3, 1807, (1 Terr. Laws, p. 120, § 45,) a sheriff's deed unacknowledged in court was ineffectual to pass the title to the purchaser; the authority of the sheriff being statutory, it should have been strictly pursued. *Id.*
10. Where a deed of conveyance purports to have been executed by making a mark or cross and has been attested in the same manner, the 27th section of the act of March 25th, 1845, (R. C. 1845, p. 223,) did not authorize the granting of a certificate of proof of such a deed. *Id.*
11. Where there is a palpable omission in the description of a deed, it may be supplied by construction. *Hoffman v. Reihl*, 554.
12. In the absence of calls for specific objects or other controlling calls, the course will control. *Id.*
13. Where a party's acts are given in evidence, he may give in evidence, in rebuttal, other acts which are a part of, or connected with and explanatory of, those previously used against him. *Blair v. Marks*, 579.

CORPORATION.

1. The old Bank of Missouri, having accepted the provisions of the act regulating banks and banking institutions, &c. (see Sess. Acts, 1857, p. 14) established, as required by the 12th section of the 10th article of said act, a branch bank at Palmyra, in Marion county, and furnished to it a capital of \$62,500. The parent bank appointed all the directors, nine in number, there being no private subscription of stock at the time. Afterwards, books of subscription were opened at Palmyra, and \$62,500 in stock were subscribed; some of these shares were forfeited and only \$33,660 were paid in on the stock subscribed. The parent bank, claiming under these circumstances the right to appoint six out of the nine directors, ordered an election for the three remaining directors on the 1st of March, 1858. The directors of the branch bank also resolved that an election should be held for three directors on said day,

CORPORATION—(*Continued.*)

and notice was given to that effect. An election was accordingly held and a large majority of the stockholders voted for five directors instead of three; a small minority voted for three persons as directors. The latter were declared duly elected. *Held*, 1st, that under such circumstances the parent bank was authorized, by the 15th section of the 10th chapter of said act above referred to, to appoint six of the directors, and that the private stockholders were entitled to appoint no more than three; that the furnishing of capital, within the meaning of said section, is not the subscribing of stock merely, but the payment of the same; 2d, that the election being legally an election for three directors only, the votes given for five directors were illegal and were properly disregarded, and the three directors voted for were properly declared elected. *The State, ex rel., v. Thompson*, 365.

2. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town. *McDonald v. Schneider*, 405.
3. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town. *Id.*

COSTS.

1. In retaxing the costs in a cause, if the fees are not legally chargeable they will be disallowed; if the fee-bill on its face is illegal, it must be rejected; but if the charges are such as may have been legally incurred in the prosecution or defence of the action, the fee-bill will be taken to be *prima facie* correct, and the burden of showing its incorrectness is on him who objects to it. *The State v. McO'Brien*, 508.

COUNTY COURTS.

See ADMINISTRATION. PRACTICE, 26. RECOGNIZANCE.

1. The general appellate jurisdiction that the circuit courts exercise over the county courts does not authorize them to try *de novo* causes appealed from the county courts. *Lacy v. Williams*, 280.
2. Curators of the estates of minors can not be appointed by the county courts of counties in which such children do not reside. *Id.*
3. An appeal will lie to a circuit court from an order of a county court removing the guardian of an insane person. *Hall v. Audrain County Court*, 329.
4. In perfecting such an appeal, an affidavit and appeal bond or recognizance are not required. *Id.*
5. A mandamus will lie in such case from the circuit court to the county court requiring it to grant an appeal, although a writ of error might have been resorted to. *Id.*

COURT.

See COUNTY COURTS. EVIDENCE, 5.

COVENANT.

See RELEASE.

1. A covenant not to sue one of several persons jointly liable will not discharge the others. *Carondelet v. Desnoyer's Adm'r*, 36.

CREDITORS.

See FRAUD AND FRAUDULENT CONVEYANCES. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

CRIMES AND PUNISHMENTS.

See CONSTITUTIONAL LAW.

1. J. D. and M. G. were jointly indicted for a felonious assault upon one C. H. The indictment charged that they in and upon one C. H. "feloniously and wilfully did make an assault, with a certain knife of the length, &c., which they the said J. D. and M. G. then and there in their right hand had and held, with the intent then and there him, the said C. H., with the knife aforesaid, wilfully and feloniously to kill, against," &c. *Held*, that the indictment was sufficient to sustain a conviction thereon. *State v. Dalton*, 13.
2. Evidence of character, to be admissible, must be restricted to that trait of character in issue. *Id.*
3. An indictment, founded on section 1 of the act regulating dram-shops, charging that the defendant, on, &c., at, &c., sold intoxicating liquors, to-wit, one quart of whisky, "without having any license for that purpose continuing in force during all that time authorizing him so to do," &c., is sufficient; it sufficiently negatives any legal authority on the part of defendant to sell intoxicating liquors. *The State v. Gregory*, 231.
4. An indictment founded on the 36th section of the 8th article of the act concerning crimes and punishments (R. C. 1855, p. 631) charging that the defendant, on, &c., at, &c., "did then and there unlawfully keep open a grocery by then and there permitting persons to enter said grocery and then and there to drink intoxicating liquors," is good. *The State v. Crabtree*, 232.
5. To authorize the conviction of a grocery-keeper on such an indictment, it is not sufficient that he permits persons to enter his grocery on Sunday and to drink intoxicating liquors there; it must appear that the acts done by him are done for the accommodation of customers and in continuation of the usual business of the week. *Id.*
6. If one having a gun in his hands raises it to a level and directs it towards, but not directly at, another, and threatens to kill him if he advances in a certain direction, it will constitute an assault; it is not necessary that the gun should be raised to the shoulder. *The State v. Epperson*, 255.
7. Each act of selling liquor without license is a distinct offence for which the party so doing may be prosecuted by a separate indictment or by different counts in the same indictment; when the defendant pleads that the offence charged against him is the same of which he had been previously convicted, the onus is on him to sustain his plea; it is not sufficient for him to show that the evidence adduced against him would have supported the first indictment because it would have been sustained by proof of any act of selling within twelve months before the finding thereof. *The State v. Andrews*, 267.
8. In all cases in which a person arraigned upon an indictment does not confess the indictment to be true, a plea of not guilty should be entered,

CRIMES AND PUNISHMENTS—(Continued.)

- and the same proceedings should be had as if he had formally pleaded not guilty to the indictment. (R. C. 1855, p. 1181, § 5.) *Id.*
9. In the case of a conviction for an offence not capital, an omission to enter of record the *allocution*, or formal address of the judge to the prisoner asking him if he has any thing to say why sentence should not be pronounced against him, is not of itself fatal. *The State v. Ball*, 324.
 10. In the entry of the empannelling of a jury, the jury were stated to be "twelve good and lawful men," and their names were given, but the same name was inserted twice, making thirteen in all; *held*, that this was merely a clerical error. *Id.*
 11. An affirmative verdict, in response to an indictment for murder in the first degree, of "guilty of murder in the second degree, in manner and form as charged," &c., is by implication an acquittal of murder in the first degree, and, so long as it stands, it is a bar to any prosecution for the higher grade of offence. *Id.*
 12. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence. *The State v. Cross*, 332.
 13. Drunkenness does not mitigate a crime; nor can it be taken into consideration by a jury in determining whether a person committing a homicide acted thereon wilfully, deliberately and premeditatedly so as to constitute the crime committed murder in the first degree. (RICHARDSON, Judge, dissents from this doctrine, holding that, although a homicide committed wilfully, deliberately and premeditatedly is in no way mitigated or excused by drunkenness, yet, since the quality and grade of the offence depend upon the state of mind of the accused at the time of the commission of the alleged crime, his drunkenness may be taken into consideration by the jury in determining whether the killing was done wilfully, deliberately and premeditatedly.) *Id.*
 14. The law presumes the innocence, not the guilt, of an accused person; it is error to instruct a jury that in order to find a verdict of guilty it is not necessary that they should be satisfied of the defendant's guilt to the exclusion of a reasonable doubt, but that if they believe from the evidence that the defendant is guilty they should so find, although they may entertain a reasonable doubt. *The State v. Fugate*, 535.
 15. To constitute murder in the first degree, the act of killing must be intentional, and done without justifiable cause. *The State v. Hicks*, 588.
 16. Where a homicide is committed under circumstances that leave it in doubt whether the act was committed maliciously or from an apprehension of real danger, the jury may consider the fact that the deceased was of a rash, turbulent and violent disposition in determining whether the accused had reasonable cause to apprehend great personal injury to himself. *Id.*
 17. An indictment, under section 30 of article 8 of the act concerning crimes and punishments (R. C. 1855, p. 630), charging that the defendants unlawfully did disturb a congregation and assembly of people met for

CRIMES AND PUNISHMENTS—(Continued.)

religious worship, by wilfully behaving in a rude and indecent manner and using profane discourse within the place of worship of said congregation, is bad; the offence should be charged to have been done wilfully, maliciously or contemptuously. *The State v. Hopper*, 599.

CROP.

See WILLS AND TESTAMENTS.

CURATORS.

1. Curators of the estates of minors can not be appointed by the county courts of counties in which such children do not reside. *Lacy v. Williams*, 280.

CUSTOM.

See COMMON CARRIER.

D

DAMAGES.

1. To warrant a jury in giving exemplary damages, in an action of trespass, it is not necessary to show that the defendant was prompted by ill will and hostility toward the plaintiff. *Goetz v. Amsb*, 28.
2. If an injury to the person be committed unintentionally and result simply from a want of care, the damages awarded should be compensatory; if it be wilful and intentional, exemplary damages may be allowed. *Id.*
3. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption. *Id.*
4. Where a person hires a slave for a year and the said slave is wrongfully taken out of his possession during the term of service, the measure of damages in a suit against the wrongdoer is the value of the services of the slave during the residue of the term, even though the suit should be instituted before the expiration of such term. *Moore v. Winter*, 380.
5. If, however, services are rendered by him which are of value to the person with whom he contracts and are accepted by such person, an obligation is thereby created to pay the reasonable value of such services, not exceeding the contract price, taking into consideration and making allowance for any damage resulting from the breach of the contract. *Id.*
6. If a minor enter into a special contract to do certain work, he may avoid such contract and may recover a reasonable compensation for the work done, the damage resulting from the avoiding of the contract being taken into consideration and allowed. *Id.*
7. Where an employee, wrongfully discharged before the completion of his term of service, brings an action, before the expiration of such term, to recover damages for the breach of the contract, it is error to rule that the measure of damages is the contract price of his services for the whole term. *Ream v. Watkins*, 516.

DAMAGES—(Continued.)

8. Where in a submission to arbitration the matter in dispute is stated to be the "taking of a quantity of timber from the land" of the plaintiffs, the arbitrators would not be authorized to assess treble damages. *Frissell v. Fickes*, 557.
9. Where a defendant, in an action for breach of promise of marriage, attempts in his answer to justify his noncompliance with his contract by charging that the character of the plaintiff for virtue is bad, the fact that this imputation is unwarrantably made is a circumstance that aggravates the damages; and the jury may take the same into consideration in estimating the damages. *Davis v. Slagle*, 600.

DEDICATION TO THE PUBLIC.

1. A clear intention to dedicate is necessary to constitute a dedication of land to the public. *Missouri Blind Institute v. How*, 211.
2. To authorize the presumption of an intention to dedicate land to the public as a street, there must be either an acquiescence by the owner for twenty years in the free use and enjoyment of such land as a public street, or such clear, unequivocal and decisive acts as will amount to an explicit manifestation of his will to make a permanent abandonment and dedication thereof to the public. *Id.*
3. When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of nonuser would, it would seem, be necessary to raise a presumption of abandonment by the public. *State v. Young*, 259.

DEED.

See CONVEYANCE.

DEMAND.

See BAILMENT.

DEPOSITION.

1. Where a party to a suit, through no negligence on his part, but through reliance upon the promises of a notary before whom a deposition is being taken, and of the opposing counsel, is prevented from cross-examining the witness, the deposition should be suppressed. *Dannefelser v. Weigel*, 45.

DESCENTS AND DISTRIBUTIONS.

1. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow. *Herndon v. Herndon's Adm'r*, 421.

DEVISE.

See WILLS AND TESTAMENTS.

DIRECTORS.

See CORPORATION, 1. ELECTION.

DISCHARGE.

See **INSOLVENT LAWS.**

DISSEIZIN.

See **FORCIBLE ENTRY AND DETAINER, 3.**

DISTURBANCE OF PUBLIC WORSHIP.

See **CRIMES AND PUNISHMENTS.**

DIVORCE.

See **MARRIAGE.**

1. After a husband or wife has been wronged in such a manner as would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offence. *Twyman v. Twyman*, 383.
2. The admissions of a party to a proceeding for divorce are evidence against him, but alone they are not sufficient to warrant a decree; they must be supported by other evidence. *Id.*

DOMICIL.

1. Generally, the domicile of the parent is the domicile of the minor child. *Lacy v. Williams*, 280.

DOWER.

1. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow. *Herndon v. Herndon's Adm'r*, 421.

DRAY TICKET.

See **COMMON CARRIER.**

DRUNKENNESS.

1. Drunkenness does not mitigate a crime; nor can it be taken into consideration by a jury in determining whether a person committing a homicide acted thereon wilfully, deliberately and premeditatedly so as to constitute the crime committed murder in the first degree. (RICHARDSON, Judge, dissents from this doctrine, holding that, although a homicide committed wilfully, deliberately and premeditatedly is in no way mitigated or excused by drunkenness, yet, since the quality and grade of the offence depend upon the state of mind of the accused at the time of the commission of the alleged crime, his drunkenness may be taken into consideration by the jury in determining whether the killing was done wilfully, deliberately and premeditatedly.) *The State v. Cross*, 532.

E**EASEMENT.**

1. A clear intention to dedicate is necessary to constitute a dedication of land to the public. *Missouri Blind Institute v. How*, 211.
2. To authorize the presumption of an intention to dedicate land to the public as a street, there must be either an acquiescence by the owner

EASEMENT—(*Continued.*)

for twenty years in the free use and enjoyment of such land as a public street, or such clear, unequivocal and decisive acts as will amount to an explicit manifestation of his will to make a permanent abandonment and dedication thereof to the public. *Id.*

EJECTMENT.

See LIMITATION.

1. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, 198.
2. Where, in an action of ejectment, the person from or through whom the defendant claims title to the premises has, on motion of the defendant, been made a co-defendant, the plaintiff is not entitled to dismiss the suit as to such co-defendant. *Hayden v. Stewart*, 286.
3. Under the practice act of 1849 an equitable defence might be made to an action of ejectment. *Id.*
4. In an action of unlawful detainer the merits of the title can in nowise be inquired into; it is immaterial whether the intruder is a naked trespasser or enters under a paramount title; the purchaser at a sheriff's sale under an execution is put to his ejectment if the defendant refuse to yield possession. *Spalding v. Mayhall*, 377.
5. In order that a defendant may defeat a recovery in an action of ejectment by showing an outstanding title in a third person, such outstanding title so set up must be a present, subsisting and operative title, such an one as the owner thereof could recover on if he were asserting it in an action. *McDonald v. Schneider*, 405.
6. Possession of land is presumed to be in the true owner. Being presumed to be in the possession of the whole, another entering upon him, whether under color of title or not, can acquire title as against him, under the statute of limitations, only to such portion as is actually occupied by him for twenty years adversely to the true owner; he is confined to his actual adverse possession, and the burden is on him to show such actual adverse possession and its extent. *Id.*
7. Actual possession of part of a tract of land under claim and color of title to the whole is constructive possession of the whole as against all persons not having title; as against such person in possession of part, the constructive possession of the residue would be in the true owner. *Griffith v. Schwendeman*, 412.
8. Possession of a parcel that has been occupied for twenty years can not be connected with the possession for a shorter period of another tract so as to bring the latter within the operation of the statute of limitations. *Id.*

ELECTION.

1. The old Bank of Missouri, having accepted the provisions of the act regulating banks and banking institutions, &c. (see Sess. Acts, 1857,

ELECTION—(Continued.)

p. 14) established, as required by the 12th section of the 10th article of said act, a branch bank at Palmyra, in Marion county, and furnished to it a capital of \$62,500. The parent bank appointed all the directors, nine in number, there being no private subscription of stock at the time. Afterwards, books of subscription were opened at Palmyra, and \$62,500 in stock were subscribed; some of these shares were forfeited and only \$32,660 were paid in on the stock subscribed. The parent bank, claiming under these circumstances the right to appoint six out of the nine directors, ordered an election for the three remaining directors on the 1st of March, 1858. The directors of the branch bank also resolved that an election should be held for three directors on said day, and notice was given to that effect. An election was accordingly held and a large majority of the stockholders voted for five directors instead of three; a small minority voted for three persons as directors. The latter were declared duly elected. *Held*, 1st, that under such circumstance the parent bank was authorized, by the 15th section of the 10th chapter of said act above referred to, to appoint six of the directors, and that the private stockholders were entitled to appoint no more than three; that the furnishing of capital, within the meaning of said section, is not the subscribing of stock merely, but the payment of the same; 2d, that the election being legally an election for three directors only, the votes given for five directors were illegal and were properly disregarded, and the three directors voted for were properly declared elected. *The State, ex rel., v. Thompson*, 365.

EMINENT DOMAIN.

See CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

ESTOPPEL.

1. A division line mistakenly located and agreed upon by adjoining proprietors will not be held binding and conclusive upon them if no injustice be done by disregarding it. *Menkens v. Blumenthal*, 198.

EQUITY.

See INJUNCTION. MISTAKE. MORTGAGE, 1, 2.

1. An agreement to refer a matter in dispute to arbitrators can not be specifically enforced. *King v. Howard*, 21.
2. A. purchased certain leasehold premises with a saw-mill thereon, which were subject at the time of his purchase to a deed of trust made to secure certain promissory notes. A., at the time of his purchase, had notice of the existence of this deed and supposed it to be a valid encumbrance upon the property. In point of fact the notes and deed of trust were procured by fraud. After A.'s purchase the trustee under the deed of trust advertised the premises for sale and proceeded to sell the same, and at the sale the premises were struck off to one K. as the highest bidder. K. acted as the agent of A. and made the purchase for his benefit. Both A. and K. acted in ignorance of the fraud in procuring the notes and deed of trust. The trustee refused to execute a deed to K. and re-advertised the premises for sale under the deed of trust. K.,

EQUITY—(Continued.)

- acting for the benefit of A. and with a bond of indemnity from him, procured a temporary injunction enjoining the sale, A. becoming his surety on his injunction bond. This injunction was afterwards dissolved. In the meantime the saw-mill had burned down during the pendency of the injunction proceedings and previous to the dissolution of the injunction. The damages awarded to the defendants on the dissolution of the injunction were the full amount of the notes, with interest, &c.; which were paid by A. to the person who had originally procured by fraud the execution of the notes and deed of trust. Until after the termination of the injunction proceedings A. supposed that the deed of trust was a valid encumbrance. *Held*, that A., not being the party defrauded, was not entitled to recover back the amount so paid by him. *Magwire v. Hall's Adm'r*, 146.
3. A sheriff's deed must be under seal; if not sealed, a court of equity can not aid its imperfect execution; nor should a court presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted by mistake to seal the deed. *Moreau v. Branham*, 351.
 4. Where there has been a part performance of a parol contract for the purchase of land, and the vendor puts it out of his power to specifically perform his contract by selling the land to a *bona fide* purchaser without notice, although there would be no remedy by action at law for damages inasmuch as the contract is by parol, equity will entertain jurisdiction of a bill for compensation. *Lee v. Howe*, 521.
 5. By the rules of chancery practice in force prior to the passage of the practice act of 1848, bills of exceptions were as necessary as in common law suits. *Madden's Heirs v. Madden's Adm'r*, 544.
 6. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Id.*

EVIDENCE.

See LANDS AND LAND TITLES, 2, 3. LIMITATION, 8. ADMINISTRATION. PRIVILEGED COMMUNICATIONS. MORTGAGE. CRIMES AND PUNISHMENTS. PARTITION, 7. CONVEYANCE, 3, 8, 9, 10.

1. Evidence of character, to be admissible, must be restricted to that trait of character in issue. *State v. Dalton*, 13.
2. The fact that a defendant is present in court, during the trial of the cause in obedience to a subpoena, ready to testify when called, will not render it improper to receive in evidence a deposition of said defendant taken in another cause in which he was a party; though not admissible as a deposition, it may, being signed by him, be received as a written admission. *Charleson v. Hunt*, 34.
3. The doctrine of presuming conveyances rests mainly upon long and uninterrupted possession in the owners of the title in favor of which the presumption is indulged; if this possession be had, not under the title in favor of which such a presumption is invoked, but under an-

EVIDENCE—(Continued.)

other title not shown to be owned by the person so invoking it, a conveyance will not be presumed to supply the defect. *Dessaunier v. Murphy*, 48.

4. It is no infringement of that provision of the constitution giving the accused the right in all criminal prosecutions to meet the witnesses against him face to face, to receive in evidence, against the defendant in a criminal prosecution, a deposition taken before the committing magistrate in the presence of the accused—the deponent being dead at the time of trial. *The State v. Harman*, 120.
5. It is the province of the court to construe written instruments; where, however, they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. *Pimm v. Haren*, 205.
6. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto. *Id.*
7. Where the possession of land by a party in whose favor it is sought to invoke the presumption of a deed is entirely consistent with title in another—as where a father (in whose behalf the presumption is invoked as against his son and the son's heirs) is in possession of land during the minority of the son, or after the death of the son, at which time the law devolved a life interest in the land of the son upon the father—such possession will not authorize the presumption of a conveyance. *Watson v. Bissell*, 220.
8. Declarations of a person in possession of land as a life tenant can not be received in evidence to elevate his life estate into an estate in fee. *Id.*
9. An exemplification of a patent certified by the Commissioner of the General Land Office, may be received in evidence without proof of the loss of the original patent. *Barton v. Murrain*, 235.
10. Under the general law of the state certified copies of deeds of conveyance may be received in evidence upon proof that the originals are not “within the power” of the party offering such copies—that is, not within his control or possession, nor in the possession of his agent, servant or bailee. *Id.*
11. Where, however, deeds conveying portions of the military bounty land in this state are executed in other states of the Union, and acknowledged and proved in accordance with the laws and usages of such states and not in accordance with the law of this state, certified copies of such deeds can be read in evidence only upon proof of the loss or destruction of the original. *Id.*
12. The loss of such instruments should be presumed if it appear that search has been made in the proper places and by the proper persons, and that they can not be found after due diligence has been used in looking for them. *Id.*
13. The official character of school trustees may be proved by their acts and conduct as such; the oaths of office filed by them with the clerks

EVIDENCE—(Continued.)

- of the county courts and their official bonds are competent evidence to prove such official character. *Eads v. Wooldridge*, 251.
14. In an action for a malicious prosecution, in which it was alleged by the plaintiff that the defendants appeared before the grand jury and, without probable cause, &c., caused plaintiff to be indicted for perjury, no grand juror can be permitted to testify and disclose the name of any witness who appeared before said jury. *Beam v. Link*, 261.
 15. Where a suit is commenced by attachment on a promissory note and a person interpleads claiming the property attached as trustee for the wife of the defendant in the attachment, by virtue of a deed executed and recorded two years before the date of the note sued on, the plaintiff may show that the note sued on was given for a debt that existed before the execution of said deed. *Blue v. Penneston*, 272.
 16. The acts of the grantor (the father of the *cestui que trust* in said deed) and her husband (the defendant in the attachment suit) in selling certain of the slaves embraced in said deed, are competent evidence as bearing upon the question of fraud in its execution. *Id.*
 17. In an action on a warranty of soundness of a negro slave, the declarations of such slave with respect to her symptoms, made by her when sick, are competent evidence as bearing upon the question of unsoundness. *Wadlow v. Perryman's Adm'r*, 279.
 18. Where a document is admissible in evidence for any purpose, it should not be excluded; it devolves on the opposite party to call on the court to state and explain to the jury how far and for what purposes it is evidence. *Allen v. Moss*, 354.
 19. The admissions of a party to a proceeding for divorce are evidence against him, but alone they are not sufficient to warrant a decree; they must be supported by other evidence. *Twyman v. Twyman*, 383.
 20. Interest in the event of a suit does not render the person so interested an incompetent witness. *Sawyer v. Mitchell*, 510.
 21. The fact that a person introduced as a witness had, before the commencement of the suit, received an order from the plaintiff for sum sued for, the order not being accepted in discharge of the debt due him from the plaintiff, and that he was authorized to bring suit for the plaintiff, does not disqualify him as a witness in behalf of the plaintiff; the suit is not prosecuted for his immediate benefit. *Id.*
 22. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Price*, 505.
 23. If relevant testimony with respect to an alleged written contract be introduced by either party to a suit, the other party is entitled to have said contract read in evidence. *Newman v. Mays*, 520.
 24. Where there is any testimony which tends to support any of the issues in a cause, it is error to instruct the jury that there is no evidence before them. *Yates v. Brackenridge*, 531.
 25. The admissions or declarations of one partner are competent evidence

EVIDENCE—(Continued.)

against the other partners; if made after the dissolution of the partnership they are not competent evidence. *American Iron Mountain Co. v. Evans*, 552.

26. A., a blacksmith, sued B.'s administrator to recover a blacksmithing account of five years' standing, amounting altogether during that time to \$183.25, the balance claimed after allowing credits being \$97.25. *Held*, 1st, that in order to account for the non-production of the plaintiff's books, it might be shown that the books were kept by the plaintiff himself; 2d, that, some of the particular items charged being proved, it was competent for the plaintiff to show, in support of his general account, that B. had all his blacksmithing done at plaintiff's shop; that B.'s farm was of a particular extent, and that he had thereon a particular number of horses and wagons, and testimony of a like character. *Fath v. Meyers' Adm'r*, 568.
27. Where a party's acts are given in evidence, he may give in evidence, in rebuttal, other acts which are a part of, or connected with and explanatory of, those previously used against him. *Blair v. Marks*, 579.
28. Where a homicide is committed under circumstances that leave it in doubt whether the act was committed maliciously or from an apprehension of real danger, the jury may consider the fact that the deceased was of rash, turbulent and violent disposition in determining whether the accused had reasonable cause to apprehend great personal injury to himself. *State v. Hicks*, 588.

EXECUTION.

See JUSTICES' COURTS, 4, 5. SHERIFF'S SALES. HUSBAND & WIFE.

1. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day of the execution issued by the justice, the circuit court should quash such execution. *Dillon v. Rash*, 243.
2. Every execution must be founded on a legal judgment. *Bain v. Cushman*, 293.
3. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.) *Miller v. Wall*, 440.
4. Where a father, being in failing circumstances, purchases land and causes the title to be vested in a third person in trust for his own children with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of his creditors; this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors. *Herrington v. Herrington*, 560.

EXEMPTION FROM LEVY.

See HUSBAND AND WIFE.

F

FACTOR.

See PRINCIPAL AND AGENT.

FEES.

See SHERIFF'S SALES, 3, 4. COSTS.

FINDING OF FACTS.

See PRACTICE.

FIXTURES.

1. A bathing tub and lead water pipes fastened to the walls and floor of a building by nailing are fixtures as between a vendor and vendee. *Cohen v. Kyler*, 122.
2. It is a mixed question of law and fact whether particular things are fixtures or not; juries should be guided to an intelligent determination of the question by an explanation of the legal meaning of the term. *Grand Lodge v. Knox*, 315.

FORCIBLE ENTRY AND DETAINER.

1. An action of unlawful detainer can not be maintained in the name of one person to the use of another; it can only be maintained by the person or persons entitled to the possession of the premises in controversy. *Ferguson v. Ham*, 249.
2. In an action of forcible entry and detainer, in case of a verdict for the complainant, the jury may assess damages for all waste and injury committed upon the premises as well as for all rents and profits of the same up to the time of the rendition of the verdict. *Eads v. Woolbridge*, 251.
3. The term disseizin, as used in the third section of the act concerning forcible entry and detainer (R. C. 1855, p. 787); has not a technical meaning; it applies to any entry, which is wrongful and without force, upon the actual possession of another. *Spalding v. Mayhall*, 377.
4. In an action of unlawful detainer the merits of the title can in nowise be inquired into; it is immaterial whether the intruder is a naked trespasser or enters under a paramount title; the purchaser at a sheriff's sale under an execution is put to his ejectment if the defendant refuse to yield possession. *Id.*
5. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer. *Burns v. Patrick*, 434.
6. In an action of forcible entry and detainer the jury returned the following verdict: "We, the jury, find the defendants guilty in manner and form as charged in plaintiffs' complaint; and that they took possession of the premises the 15th of November, 1854; and that they have and recover of and from the defendants damages at the rate of \$2.16½ per month for the unlawful detention of said premises." *Held*, that this verdict, though informal, was sufficient to authorize thereon a judg-

FORCIBLE ENTRY AND DETAINER—(Continued.)

ment for restitution of the premises, and for an amount as damages equal to double the gross amount of the rents and profits at the rate of \$2.16½ per month up to the time of trial. *Gibson v. Lewis*, 532.

FRAUD AND FRAUDULENT CONVEYANCES.

See PRINCIPAL AND AGENT, 3. EQUITY.

1. A. purchased certain leasehold premises with a saw-mill thereon, which were subject at the time of his purchase to a deed of trust made to secure certain promissory notes. A., at the time of his purchase, had notice of the existence of this deed and supposed it to be a valid encumbrance upon the property. In point of fact the notes and deed of trust were procured by fraud. After A.'s purchase the trustee under the deed of trust advertised the premises for sale and proceeded to sell the same, and at the sale the premises were struck off to one K. as the highest bidder. K. acted as the agent of A. and made the purchase for his benefit. Both A. and K. acted in ignorance of the fraud in procuring the notes and deed of trust. The trustee refused to execute a deed to K. and re-advertised the premises for sale under the deed of trust. K., acting for the benefit of A. and with a bond of indemnity from him, procured a temporary injunction enjoining the sale, A. becoming his surety on his injunction bond. This injunction was afterwards dissolved. In the meantime the saw-mill had burned down during the pendency of the injunction proceedings and previous to the dissolution of the injunction. The damages awarded to the defendants on the dissolution of the injunction were the full amount of the notes, with interest, &c.; which were paid by A. to the person who had originally procured by fraud the execution of the notes and deed of trust. Until after the termination of the injunction proceedings A. supposed that the deed of trust was a valid encumbrance. *Held*, that A., not being the party defrauded, was not entitled to recover back the amount so paid by him. *Magwire v. Hall's Adm'r*, 146.
2. Whenever it appears from the face of an assignment of a stock of goods to a trustee for the benefit of certain designated creditors that it is the intent of the parties thereto that the grantor shall be allowed to remain in possession of the property assigned and to dispose of the same in the usual course of business until default, such deed of assignment should be held to be a conveyance in trust to the use of the grantor within the first section of the act concerning fraudulent conveyances, and consequently void as against creditors. *Stanley v. Bunce*, 269.
3. It is not necessary that the deed of assignment should expressly provide that the grantor should remain in possession and continue to dispose of the goods in the usual course of business; it is sufficient to avoid the assignment that such appears, from a consideration of the whole instrument, to be the intent of the parties. *Id.*
4. Where a suit is commenced by attachment on a promissory note and a person interpleads claiming the property attached as trustee for the wife of the defendant in the attachment, by virtue of a deed executed

FRAUD AND FRAUDULENT CONVEYANCES—(Continued.)

- and recorded two years before the date of the note sued on, the plaintiff may show that the note sued on was given for a debt that existed before the execution of said deed. *Blue v. Penneston*, 272.
5. The acts of the grantor (the father of the *cestui que trust* in said deed) and her husband (the defendant in the attachment suit) in selling certain of the slaves embraced in said deed, are competent evidence as bearing upon the question of fraud in its execution. *Id.*
 6. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian. *Mitchell v. Williams*, 399.
 7. Fraud in the consideration of a negotiable promissory note is no defence to an action thereon by an endorsee to whom the same was endorsed before maturity without notice. *Jaccard v. Shands*, 440.
 8. Where a vendor knows the existence of a latent defect in an article sold by him, and sells the same for a sound price without disclosing the defect to the vendee, he is guilty of a fraud; such fraud may be set up as a defence to an action founded on a note given for the price of the article sold; it is not necessary that there should be any express warranty or representation as to the quality of the article sold. *Barron v. Alexander*, 530.
 9. Where a father, being in failing circumstances, purchases land and causes the title to be vested in a third person in trust for his own children with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of his creditors; this interest may be seized and sold on execution under a judgment against him in favor of one of those creditors. *Herrington v. Herrington*, 560.

G

GARNISHEE.

See ATTACHMENT.

GENERAL ASSEMBLY.

See CONSTITUTIONAL LAW. TAXING POWER.

GROCERY-KEEPER.

See CRIMES AND PUNISHMENTS.

GROWING CROP.

See WILLS AND TESTAMENTS.

GUARANTY.

1. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (*Johnson v. McCune*, 21 Mo. 211, affirmed.) *Johnson's Adm'r v. McCune*, 171.

GUARDIAN.

1. If a person, assumig to act as a guardian for another without any legal authority so to do, should receive moneys to be appropriated to the

GUARDIAN—(*Continued.*)

latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Johnson v. Smith's Adm'r*, 591.

GUARDIAN'S BOND.

1. An action on a guardian's bond must be brought in the name of the state. *Mitchell v. Williams*, 399.
2. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward. *Id.*
3. An equitable proceeding to set aside allowances of a probate court in favor of a guardian can only be sustained by proof that the allowances were fraudulently procured by such guardian. *Id.*

H

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

See CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

HIGHWAYS.

See ROADS AND HIGHWAYS.

HUNT'S MINUTES.

See LANDS AND LAND TITLES.

HUSBAND AND WIFE.

1. Debts contracted by a husband after property has come into the possession of his wife by descent, &c., may be enforced against that property. It is not exempted from execution by the act of March 5, 1849. (Sess. Acts, 1849, p. 67.) *Barbee v. Wimer*, 140.
2. On the death of a husband without children, the increase of a female slave, that came to the husband in right of the marriage, remaining undisposed of at his death, passed, under the dower act of 1845 (R. C. 1845, p. 430, § 3), with the mother to the widow. *Herndon v. Herndon's Adm'r*, 421.

I

IMPORTER.

See CONSTITUTIONAL LAW.

INCORPORATION.

See CORPORATION.

INDEMNIFICATION BOND.

1. The only objection that can be entertained by the court—under the seventh section of the local act of March 3, 1853, concerning the duties of sheriff and marshal in the county of St. Louis, (Sess. Acts, 1855, p. 464)—to an indemnification bond demanded by the sheriff under said act is in relation to the sufficiency of the security; it can not be ob-

INDEMNIFICATION BOND—(Continued.)

- jected that the penalty of the bond is insufficient. *Cochran v. Goddard*, 500.
2. The action of the court under the 8th section is not conclusive on the claimant as to any other valid objection to the bond. *Id.*

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INFANCY.

See CURATOR. PARTITION. PARENT AND CHILD.

1. Infants may be made parties plaintiff in statutory proceedings for partition. (*Johnson v. Noble*, 24 Mo. 252, overruled.) *Thornton v. Thornton*, 302.
2. Infants can not appear by attorney; they may appear by guardian. *Id.*
3. Generally, the domicile of the parent is the domicile of the minor child. *Lacy v. Williams*, 280.
4. A statement, in a letter to a party sought to be retained as clerk of a boat then building, that the boat was expected out at a specified time, can not be construed into a guaranty or engagement that she would be out at the time named. (*Johnson v. McCune*, 21 Mo. 211, affirmed.) *Johnson's Adm'r v. McCune*, 171.
5. Leases to infants are not absolutely void; they are only voidable. *Griffith v. Schwendeman*, 412.

INJUNCTION.

See EQUITY.

1. L., being indebted to D., E. and F., assigned to D. in trust to secure said D., E. and F. certain promissory notes executed by O. & R. One J. recovered a judgment against L. Afterwards said L., D., E., F., O. & R. entered into an arrangement, by which, upon the allowance of certain credits upon said notes, O. conveyed a certain lot of ground to L., and L. at the same time conveyed the same in trust to secure D., E. and F. The sum bid by D. at this sale was less than the amount of the indebtedness, to secure which the deed of trust was given. The land was sold under this deed of trust, and D. became the purchaser. J. caused an execution to be issued upon his judgment against L. and to be levied upon L.'s interest in said lot. *Held*, that L. had no interest in the lot upon which J.'s judgment might operate as a lien; that consequently no title would pass to a purchaser at a sheriff's sale under said execution; that an injunction would not lie to restrain a sheriff's sale thereunder. *Drake v. Jones*, 428.
2. Sheriff's sales can not be enjoined on the ground that they will pass no title and may cast a cloud on the title of the true owner. *Id.*

INSOLVENT LAWS.

1. A., a citizen of and residing in the state of Missouri, sold goods to B., who also at the time of the sale resided in said state; B. gave his note to A. for the indebtedness thus incurred; B. afterwards went to and became a citizen of California; A. transmitted said note to one C., an attorney at law in California, for collection; C., deeming it for the

INSOLVENT LAWS—(Continued.)

interest of A., surrendered said note to B., and received in renewal thereof another note from B.; this note was made payable to the order of "C., attorney of A.;" while this note remained in the hands of C., B. obtained a discharge therefrom under the insolvent law of California; C. afterwards endorsed the note to A. in Missouri, who commenced a suit thereon against B. *Held*, that the discharge under the insolvent law of California could not be regarded as a valid discharge by the law of this state. *Crow v. Coons*, 512.

INSTRUCTIONS.

See PRACTICE. JURY.

INSURANCE.

1. Among the printed clauses of a fire policy on merchandise were the following: "If there shall be deposited, kept or stored therein any of the articles, goods or merchandise in the same terms and conditions denominated 'hazardous,' or 'extra hazardous,' or included in the memorandum of 'special' rates, except as herein specially provided for, or hereafter agreed to by this corporation in writing, to be added to or endorsed upon this policy, then and from thenceforth so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force and effect." "And it is conditioned that no greater amount than twenty-five pounds of gunpowder shall at any time be placed in the building described in this policy—said powder to be kept in tin or other metallic canisters." Among the articles enumerated in the memorandum of "special" rates was gunpowder. There were no other provisions with respect to the keeping of gunpowder. *Held*, that the assured might keep on hand a quantity of powder less than twenty-five pounds in tin or other metallic canisters. *Bowman v. Pacific Insurance Co.* 152.
2. The deposit of a policy of insurance with a creditor of the assured as a security for the debt gives such creditor a lien upon the proceeds of the policy, a lien binding upon the assured, the insurer, and upon all who, with notice of such lien, take an interest in the policy from the assured. *Ellis v. Kreutzinger*, 311.
3. The clause in a policy which prohibits an assignment of the policy without the consent in writing of the insurance company, does not apply to a deposit of the policy by way of pledge. *Id.*

INTEREST.

See WITNESS.

8. Whether an administrator shall be charged with interest on money in his hands belonging to his intestate's estate is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Madden's heirs v. Madden's Adm'r*, 544.

J

JUDGMENT.

See RES ADJUDICATA. EQUITY. JUSTICES' COURTS. RELEASE. PARTNERSHIP. PARTITION. ATTACHMENT.

1. Every execution must be founded on a legal judgment. *Bain v. Cushman*, 293.
2. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, 505.

JURISDICTION.

See COUNTY COURTS. PRACTICE. ATTACHMENT. JUSTICES' COURTS.

JURY.

See PRACTICE. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption. *Goetz v. Ambts*, 28.
2. Where an instruction given at the instance of a party to a suit is decisive thereof and excludes from the consideration of the jury the questions raised by the evidence of the opposing party, it is erroneous. *Clark v. Hammerle*, 55.
3. It is the province of the court to construe written instruments; where, however, they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. *Primm v. Haren*, 205.

JUSTICES' COURTS.

See ATTACHMENT, 1, 2, 3.

1. A judgment rendered by a justice of the peace is void unless it appears on the face of the proceedings that the justice acquired jurisdiction of the cause by service of process on the defendant or by his appearance. *Bersch v. Schneider*, 101.
2. The technical rules of practice are not applicable to proceedings before justices of the peace. *Morse v. Broomfield*, 224.
3. Where in the trial, before a justice of the peace, of an issue raised by an interplea in an attachment suit, the justice entered on his docket the verdict of the jury but omitted to render judgment on it, and the interpleader appealed to the circuit court, where the appeal was dismissed for want of a judgment by the justice; *held*, that such dismissal was improper. *Id.*
4. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day

JUSTICES' COURTS—(Continued.)

- of the execution issued by the justice, the circuit court should quash such execution. *Dillon v. Rash*, 243.
5. Where a justice of the peace, in the case of separate suits by different parties against the same person, improperly renders a joint judgment in favor of the two separate plaintiffs, and certifies the same as a single judgment to the circuit court, any execution or other proceeding instituted thereon should be quashed and set aside. *Bain v. Chrisman*, 293.
 6. Under the revised code of 1845, a justice of the peace could set aside a nonsuit only in case it was rendered on account of the absence of the plaintiff at the time appointed for trial; if a justice should render a judgment of nonsuit and dismiss a cause for the alleged reason that the plaintiff had not filed with him the instrument of writing on which the suit was founded, no motion to set aside such nonsuit would be necessary to entitle the plaintiff to an appeal. *Hannibal, Ralls County and Paris Plank Road Co. v. Robinson*, 396.
 7. The seventh section of the second article of the act regulating proceedings in justices' courts (R. C. 1845, p. 638) did not, in a suit to recover the balance alleged to be due on a subscription to the capital stock of a plank road company organized under the act of February 27, 1851, (Sess. Acts, 1851, p. 259,) require the filing of the original articles of association executed by defendant and others for the purpose of organizing the company. *Id.*
 8. In suits in justices' courts, as well as in suits in the superior courts, the defendant, in order to impose upon the plaintiff the necessity of proving the execution of an instrument sued on, must deny its execution under oath. *Hickman v. Kunkle*, 401.
 9. Where a constable wrongfully levies an execution upon property exempt by law from execution, relief can be had, upon his official bond, against him and his securities, only by action thereon in the name of the state; the 23d and 28th sections of the eighth article of the act concerning justices' courts do not furnish a summary remedy in such case. (R. C. 1855, p. 968.) *Miller v. Wall*, 440.
 10. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant. *State v. Emnitz*, 521.

L

LANDLORD AND TENANT.

See LEASES.

1. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied. *Cohen v. Kyler*, 122.
2. In the absence of any agreement or understanding between a landlord and his tenant, the rent will be payable yearly and at the end of the year. *Ridgley v. Stillwell*, 128.
3. Where a landlord seeks, under the act concerning landlords and tenants (R. C. 1855, p. 1016-17), to recover possession of the demised prem-

LANDLORD AND TENANT—(*Continued.*)

- ises, the statement filed by him before the justice of the peace must set forth the amount of rent actually due to such landlord, and that the same has been demanded from the tenant. *Vaughn v. Locke*, 290.
4. Where one purchasing the demised premises of the landlord seeks to recover possession of them under the 38th section of said act, his statement of the amount of rent due and demanded should embrace only that which is due to himself, and not that which is due to his vendor. *Id.*
 5. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer. *Burns v. Patrick*, 434.

LANDS AND LAND TITLES.

1. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof. *Clark v. Hammerle*, 55.
2. Hunt's Minutes of Testimony taken under the act of Congress of May 26, 1824, are not admissible in evidence except to prove such facts as can be proved by hearsay; where, however, one party to a suit introduces them in evidence, the opposing party may have the full benefit of them. *Id.*
3. A certificate of confirmation issued in 1825 by Recorder Hunt, under the act of Congress of May 26, 1824, in favor of Joachim Roy's representatives, for a lot in the Cul de Sac, described the lot confirmed as bounded north by a field lot of A. Guion, and east by Auguste Chouteau's mill tract. On the margin of the claim of A. Guion are the following words: "In Choueau's mill tract." *Held*, that this marginal entry was not admissible in evidence, as against those claiming under Roy, to show that the lot confirmed to Roy was situate within Chouteau's mill tract. The Spanish survey of "Chouteau's mill tract," in which the land on the west of the survey is stated to be "vacante," is admissible in evidence as bearing upon the question of the location of Roy's confirmation; the same weight should be attached to it as to reputation or hearsay in establishing ancient boundaries. *Id.*
4. Where a field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitation will run in favor of an adverse possession prior to a survey by the United States, although in the tabular list of the recorder the claim was stated to be "confirmed to be surveyed." *Aubuchon v. Ames*, 89.
5. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation? *Pimm v. Haren*, 205.
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JUSTICES' COURTS—(Continued.)

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LANDS AND LAND TITLES—(Continued.)

- and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812. *Id.*
7. The recorder of land titles was not authorized by the act of Congress of May 26, 1824, to take proof in relation to the extent and boundaries of common confirmed to a village by the act of Congress of June 13, 1812; consequently, a certificate of confirmation of common issued by him would not be evidence of title thereto. *Id.*
 8. Declarations of a person in possession of land as a life tenant can not be received in evidence to elevate his life estate into an estate in fee. *Watson v. Bissell*, 220.
 9. By the Spanish law a verbal sale of immovable property was valid; to constitute such a sale valid it was not necessary the vendee should take possession, though taking possession would be strong corroborative evidence of such a sale. *Allen v. Moss*, 354.
 10. The eighth section of the act of October 1st, 1804, (1 Terr. Laws, p. 47,) requiring all deeds and conveyances to be recorded under the penalty of being adjudged fraudulent and void against subsequent purchasers and mortgagees, did not overthrow the rule of the Spanish law making verbal sales of land valid. *Id.*
 11. The commissioners appointed by the act of Congress of July 9, 1832, (4 Statutes at Large, p. 565,) were authorized to examine those unconfirmed claims only that had been previously filed in the office of the recorder of land titles; no new claims could be filed. After the passage of said act, claims undisposed of in the interval after their reservation from sale had ceased stood as they did before the passage of the act of May 26, 1824. *Papin v. Massey*, 445.
 12. A confirmation by the act of Congress of July 4, 1836, (5 Statutes at Large, p. 126,) to a person or his legal representatives, will enure, if he had assigned his interest previously to the confirmation, or was dead at that time, to his legal representatives; that is, to his heirs or to the assignee of whole or part. If only part had been assigned, the assignee and heirs would take as tenants in common. *Id.*
 13. A., the owner of an unconfirmed Spanish grant for 30,000 arpens, entered into a bond with B., in the penal sum of \$20,000, conditioned for the conveyance by himself and his heirs of 14,000 arpens out of said grant of 30,000 arpens, provided said grant should be confirmed to the said A. or his representatives. Said grant was afterwards confirmed to said A. or his representatives. *Held*, that the confirmation enured to the benefit of B., as the legal representative of A., as to that portion (14-30) of the confirmed claim covered by said bond. *Id.*

LEASES.

See LANDLORD AND TENANT.

1. Leases to infants are not absolutely void; they are only voidable. *Griffith v. Schwendeman*, 412.

LICENSE.

See CRIMES AND PUNISHMENTS. CONSTITUTIONAL LAW.

LIEN.

See COMMON CARRIER. PARTITION. INSURANCE. EQUITY. ATTACHMENT. CONSTABLE. MECHANICS' LIEN.

LIMITATION.

See DEDICATION TO THE PUBLIC.

1. Where a field lot confirmed by the second section of the act of Congress of April 29, 1816, has a definite and certain location, the statute of limitation will run in favor of an adverse possession prior to a survey by the United States, although in the tabular list of the recorder the claim was stated to be "confirmed to be surveyed." *Aubuchon v. Ames*, 89.
2. An action for use and occupation can not be maintained unless the relation of landlord and tenant exists between the parties founded on an agreement express or implied. *Cohen v. Kyler*, 122.
3. Where a plaintiff in an action of ejectment bases his right to recover upon a title acquired by an adverse possession for twenty years, it is not necessary that his possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, 198.
4. *Quere*, can Carondelet be shown to have title to land as common under the statute of limitation? *Primm v. Haren*, 205.
5. The United States survey of Carondelet common includes private claims; hence, it would be erroneous to rule that twenty years' claim and user as common, by the inhabitants of Carondelet, of the land embraced in said survey would bar the right of a private claimant who seeks to recover possession of land embraced in said survey as confirmed to him by act of Congress of June 13, 1812. *Id.*
6. When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of nonuser would, it would seem, be necessary to raise a presumption of abandonment by the public. *The State v. Young*, 259.
7. In order that a defendant may defeat a recovery in an action of ejectment by showing an outstanding title in a third person, such outstanding title so set up must be a present, subsisting and operative title, such an one as the owner thereof could recover on if he were asserting it in an action. *McDonald v. Schneider*, 405.
8. Possession of land is presumed to be in the true owner. Being presumed to be in the possession of the whole, another entering upon him, whether under color of title or not, can acquire title as against him, under the statute of limitations, only to such portion as is actually occupied by him for twenty years adversely to the true owner; he is confined to his actual adverse possession, and the burden is on him to show such actual adverse possession and its extent. *Id.*

LIMITATION—(Continued.)

9. Actual possession of part of a tract of land under claim and color of title to the whole is constructive possession of the whole as against all persons not having title; as against such person in possession of part, the constructive possession of the residue would be in the true owner. *Griffith v. Schwendeman*, 412.
10. Possession of a parcel that has been occupied for twenty years can not be connected with the possession for a shorter period of another tract so as to bring the latter within the operation of the statute of limitations. *Id.*
11. The trusts not reached or affected by the statute of limitations are those technical and continuing trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity. *Johnson v. Smith's Adm'r*, 591.
12. If a person, assuming to act as a guardian for another without any legal authority so to do, should receive moneys to be appropriated to the latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Id.*

LIS PENDENS.

1. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned. *Herrington v. Herrington*, 560.

LOAN.

See BAILMENT. BORROWER.

M

MANDAMUS.

1. A mandamus, as a general rule, will not issue unless the party asking it has a clear right and no other specific legal remedy; it will not be granted to bring under review the proceedings of an inferior court on the ground of error, and therefore it will be refused in a case in which a writ of error will lie, or where the party can be redressed by appeal. *Williams v. Judge Cooper Common Pleas*, 225.
2. A mandamus will lie from the circuit court to the county court requiring it to grant an appeal from an order removing the guardian of an insane person, although a writ of error may be resorted to. *Hall v. Andrain County Court*, 329.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE. HUSBAND AND WIFE.

MARSHAL.

See INDEMNIFICATION BOND.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANIC'S LIEN.

1. Where a builder contracts to build a house, he can have no lien for services rendered in superintending his own workmen. *Blakey v. Blakey*, 39.

MECHANIC'S LIEN—(Continued.)

2. A. contracted to build for B. a house; C. and A. agreed to secure B. against all liens, claims and losses. Liens were filed by sub-contractors against said house upon which writs of *scire facias* were issued against A. and B. These writs were served upon B., the owner, but not upon A. Judgments by default were rendered against B., which he paid. *Held*, in a suit instituted by B. against C. to recover damages for the breach of the agreement above referred to, that the records and proceedings in said suits against B. were admissible in his favor to show the amount of the judgments, and the payment of them by him. The judgments were not, however, conclusive upon C. *Picot v. Signiogo*, 125.
3. Judgments in enforcement of liens against A. and B., upon service of process upon both, would be conclusive upon C. *Id.*
4. The local mechanic's lien act of St. Louis county of February 24, 1843, (Sess. Acts, 1843, p. 83,) did not confer a lien where the person for whom the building is erected has no interest in the premises, but is a mere tenant at will. *Squires v. Fithian's Adm'r*, 134.
5. The thirty days' notice referred to in said act is required only of sub-contractors. *Id.*
6. Where the contract for the building of a house is really incomplete, the work being prosecuted from time to time as materials may be provided or as the progress of other work may require, the mechanic is not required to file his lien within six months of the completion of each detached piece of work, but within six months of the completion of the whole work. *Id.*
7. Although, in a suit instituted to enforce a mechanic's lien, the plaintiff may fail to show the existence of a lien in his favor, he will be entitled, if the pleadings and the evidence will warrant, to a general judgment. *Patrick v. Abeles*, 184.
8. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence. *Id.*
9. It is not necessary that the petition in a suit (under the mechanic's lien act of 1845, R. C. 1845, p. 735, sec. 7) to enforce a mechanic's lien should contain a prayer for a special execution against the property alleged to be charged with the lien; if the account filed with the petition and referred to therein corresponds with that filed as a lien demand, it sufficiently appears that the object of the suit is the enforcement of the lien. *Johnson v. McHenry*, 264.

MERCHANTS' LICENSES.

See CONSTITUTIONAL LAW. TAXING POWER.

MILITARY BOUNTY LAND.

See EVIDENCE, 11, 12.

MISTAKE.

1. One A. B., being indebted to C. D. in the sum of \$588.96, conveyed a certain tract of land to E. F. in trust to secure the payment thereof. In said deed the land, situate in St. Louis county, was described as

MISTAKE—(Continued.)

follows: "A tract of eighty acres of land in the northern end of survey number 369, confirmed to Samuel Smith, in township 45 north, of range 4 east, commencing, &c., [here follows a description by metes and bounds] and being all the land now owned by said A. B. within said survey No. 369." Default being made in the payment of the indebtedness secured, the trustee proceeded, at the request of C. D. and in accordance with the provisions of the trust deed, to advertise and sell the land. In his advertisement he described the land to be sold by copying the description in the deed of trust. On the day of sale the trustee proceeded to sell; the advertisement was first read, and the land was offered for sale as a tract containing eighty acres, more or less. Bids were asked by the acre for the whole tract. One G. H. was the highest bidder at the price of \$8.50 per acre, and the tract was struck off to him at that price, and the trustee gave him a memorandum of said purchase, stating that he, G. H., had become "the purchaser of said land at and for the price of eight dollars and fifty cents per acre, and had paid on his purchase \$500." The trustee paid over the said \$500 to C. D., and it was credited upon the debt. The tract was subsequently surveyed and was found to contain only twenty-three acres. During these transactions none of the parties thereto supposed that the tract contained less than eighty acres. *Held*, in a suit instituted by G. H., the purchaser, against C. D. to recover back the excess of said \$500 over and above the sum that twenty-three acres would have amounted to at \$8.50 per acre, 1st, that the sale by the trustee was not, properly considered, a sale by the acre, but a sale of the tract as a tract; 2d, that the purchaser, having bought the tract as containing eighty acres, could not recover of the *cestui que trust* or creditor the excess sued for; 3d, that he was entitled on the ground of mistake to have the sale set aside. *Coons v. North*, 73.

2. A division line mistakenly located and agreed upon by adjoining proprietors will not be held binding and conclusive upon them if no injustice be done by disregarding it. *Menkens v. Blumenthal*, 198.

"MORE OR LESS."

See AGREEMENT.

MORTGAGE.

1. The transfer of a debt secured by mortgage or deed of trust carries the security with it as an incident; if several promissory notes, secured by the same instrument, be assigned to different persons, the assignee of each note will, as a general rule, acquire an equitable interest in the mortgage. *Anderson v. Baumgartner*, 80.
2. The interest which the assignee thus acquires in the security is purely equitable; it may be lost through his negligence; it will be so lost where the rights of innocent purchasers intervene who have been misled by improper representations on his part, or lulled into security by his silence when it was his duty to speak. *Id.*
3. The test by which to determine whether a transaction is a mortgage or a conditional sale is this: if the relation of debtor and creditor re-

MORTGAGE—(Continued.)

- mains and a debt still subsists between the parties, it is a mortgage ; if, however, there is no debt still subsisting, and the grantor has the privilege of refunding if he pleases by a given time and thereby entitling himself to a reconveyance, it is a conditional sale. *Stowey v. McMurray*, 113.
4. If the transaction is a conditional sale, the party seeking a reconveyance to himself must strictly comply with the conditions imposed upon him. *Id.*
 5. The deposit of a policy of insurance with a creditor of the assured as a security for the debt gives such creditor a lien upon the proceeds of the policy, a lien binding upon the assured, the insurer, and upon all who, with notice of such lien, take an interest in the policy from the assured. *Ellis v. Kreutzinger*, 311.
 6. The clause in a policy which prohibits an assignment of the policy without the consent in writing of the insurance company, does not apply to a deposit of the policy by way of pledge. *Id.*
 7. Under the revised code of 1835 (R. C. 1835, p. 410) a mortgagee might, through an attorney in fact, acknowledge satisfaction of a mortgage on the margin of the record thereof; it was not necessary that such acknowledgment should be under seal, or that the agent should be authorized by instrument under seal. *Valle's Adm'rx v. American Iron Mountain Co.* 455.
 8. Such an entry, except in giving notice, occupies no higher ground than an unrecorded release ; a direct proceeding to set it aside is not necessary. *Id.*
 9. It was not necessary, under the revised code of 1835 (R. C. 1835, p. 410, § 13), in order to authorize an acknowledgment of satisfaction of a mortgage on the margin of the record thereof, that there should have been actual payment in money of the mortgage debt ; it was sufficient that there was "full satisfaction" of the mortgage. *Id.*
 10. In a statutory proceeding to foreclose a mortgage, where the defendant sets up as a bar to the action an acknowledgment of satisfaction of the mortgage on the margin of the record thereof, the plaintiff may show in rebuttal that such acknowledgment was procured by fraud. *Id.*
 11. In proceedings instituted under the revised code of 1845 to foreclose a mortgage, the administrator of the mortgagor was the only necessary party ; his heirs were not necessary parties. *Perkins v. Woods*, 547.
 12. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the interlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was

MORTGAGE—(Continued.)

passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, 570.

13. Where, during the pending of a suit to foreclose a mortgage, third persons become interested in the premises by purchase, it is not necessary, in order to authorize a decree against them in respect of the interest acquired by them, to make them parties to the suit; they may be made defendants, on their own motion, under the sixth section of the act concerning mortgages. (R. C. 1855, p. 1089.) *Id.*

N

NEGLIGENCE.

See COMMON CARRIER. BAILMENT.

NEW TRIAL.

1. An application for a new trial on the ground of newly discovered evidence should, as a general rule, be accompanied by the affidavit of the party seeking the new trial; the affidavit of a third person should never be received without an explanation of the reason why the party himself omitted to make it. *The State v. McLaughlin*, 111.
2. A new trial will not be granted on the ground of surprise where the object in obtaining the same is the introduction of evidence of a character merely cumulative. *State, to use, &c., v. Wightman*, 121.

NOTICE.

See MORTGAGE, 8. CONVEYANCE. VENDORS AND PURCHASERS. BILLS OF EXCHANGE AND PROMISSORY NOTES. CONDEMNATION AND APPROPRIATION TO PUBLIC USES. ATTACHMENT.

1. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void. *Dickey v. Tennison*, 373.
2. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.) *Phillips v. Riley*, 386.
3. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.) *Allen v. Moss*, 354.
4. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned. *Herrington v. Herrington*, 560.

P

PALMYRA BRANCH BANK.

See CORPORATION, 1.

PARENT AND CHILD.

1. A child allowed by its father to leave home and to work and shift for himself may maintain an action in his own name to recover the value of services rendered by him. *Ream v. Watkins*, 516.
2. At law there will be no implication of a promise on the part of a step-daughter to pay her step-father for necessities furnished by the latter during the minority of the former. *Gillett v. Camp*, 541.

PARTIES.

See PLEADING.

PARTITION.

1. Where a tenant in common in lands conveys his share to one of his co-tenants, he can not have the same partitioned and set apart to him for any purpose. *King v. Howard*, 21.
2. In a suit for partition commenced by suing out a writ of summons against the defendants upon a petition filed in the proper clerk's office, the writ of summons should be served upon the minor defendants; it is not necessary, in such cases, to serve such writ upon the guardian of such minor defendants. *Smith v. Davis*, 298.
3. A suit for partition is not triable, except, by consent of parties, at the term at which the defendant is first bound to appear. *Id.*
4. Infants may be made parties plaintiff in statutory proceedings for partition, (*Johnson v. Noble*, 24 Mo. 252, overruled.) *Thornton v. Thornton*, 302.
5. An interlocutory judgment in an action for partition, ascertaining the rights of the parties and appointing commissioners, &c., can not regularly be rendered, without the consent of the defendant, at the first term at which he is bound to appear. *Id.*
6. Where a sale in partition proceedings is made and the land embraced in the suit is bid off by one of the parties, the purchaser can not, by any agreement with any of the parties to the suit with respect to the land and the payment of the purchase money, affect the right of the sheriff to collect of such purchaser his lawful fees or enough of the purchase money to pay the costs and the portions of the purchase money belonging to those parties, if any, who do not enter into any agreement in the nature of a release with the purchaser. *Wiley v. Roberts*, 388.
7. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the in-

PARTITION—(Continued.)

terlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, 570.

8. In an action for partition the plaintiff alleged that himself and defendant were joint owners of a certain tract of land; that they were "equal partners" in the same; that the said tract had been divided into town lots, a part of which had been sold; that the residue of the lots were the joint property of the plaintiff and defendant; and prayed for partition of said remaining lots. The court sustained a demurrer to this petition. *Held*, that the demurrer was improperly sustained; that if the plaintiff and defendant held the land as partners and the affairs of the partnership were unadjusted, the land being chargeable with debts of the firm, or with a balance due the defendant, this matter should be set up in an answer; that, no such defence being interposed, partition might be made of the lots remaining unsold. *Holmes v. McGee*, 597.

PARTNERSHIP.

1. A surviving partner retained possession of the partnership effects and gave bond under sections 50 and 51 of the first article of the administration act of 1845 (R. C. 1845, p. 70); a settlement was made by him in the probate court and an order was made by said court apportioning to the estate of the deceased partner one-half of the balance found to be in the hands of such surviving partner. *Held*, in an action on the bond to recover a debt due to the deceased partner for money advanced by him to the firm, that this settlement was not conclusive as against his estate as to the amount due thereto from the surviving partner, or as to the amount of assets in the hands of the latter. *The State, to use, &c., v. Baldwin*, 103.
2. A promissory note given by one partner in the name of the firm is binding, *prima facie*, upon all the partners; if the note be given for the individual debt of the partner executing the same, or for an indebtedness created in relation to a matter known to be foreign to the business of the partnership, the partnership is not bound. It devolves upon the partners, in order to escape liability, to show these facts. *Hickman v. Kunkle*, 401.
3. A. and B. as partners owed a debt to C.; A. sold out his interest to D., who agreed with A. and B. to assume and pay the debt due C. *Held*, that C. could not maintain an action, in his own name, against D., on his said promise to, recover the said debt. *Manny v. Frasier's Adm'r*, 419.
4. Where there has been no settlement of the accounts of a partnership and no balance ascertained, an action in the nature of an action of assumpsit can not be maintained by one partner against the other to recover such undetermined balance; it is not the province of the jury to take an account and adjust the equities arising out of unsettled partnership transactions. *McKnight v. McCutchen*, 436.

PARTNERSHIP—(*Continued.*)

5. Acts of a partner wholly outside the scope of the partnership business and known to be so by the person dealing with such partner are not binding upon the other partner. *Cayton v. Hardy*, 536.
6. In determining whether particular acts of a partner are within the scope of the partnership business and binding upon all the partners, if the partnership articles are not decisive of this question, the previous dealings and acts of the partners or of any of them, the length of time these acts have continued, &c., may be considered. *Id.*
7. The admissions or declarations of one partner are competent evidence against the other partners; if made after the dissolution of the partnership they are not competent evidence. *American Iron Mountain Co. v. Evans*, 552.
8. In an action for partition the plaintiff alleged that himself and defendant were joint owners of a certain tract of land; that they were "equal partners" in the same; that the said tract had been divided into town lots, a part of which had been sold; that the residue of the lots were the just property of the plaintiff and defendant; and prayed for partition of said remaining lots. The court sustained a demurrer to this petition. *Held*, that the demurrer was improperly sustained; that if the plaintiff and defendant held the land as partners and the affairs of the partnership were unadjusted, the land being chargeable with debts of the firm, or with a balance due the defendant, this matter should be set up in an answer; that, no such defence being interposed, partition might be made of the lots remaining unsold. *Holmes v. McGee*, 597.

PATENT.

See EVIDENCE, 9.

PLEADING.

See JUSTICES' COURTS. LANDLORD AND TENANT, 3, 4. SHERIFF'S SALE, 3, 4. PARTNERSHIP, 5. FORCIBLE ENTRY AND DETAINER.

1. It is generally sufficient in pleading to state facts according to their legal effect; an averment, in a petition in trespass, that the defendant beat and struck plaintiff, will be sustained by evidence showing that he was present aiding and encouraging others in so beating and striking him. *Goetz v. Ambs*, 28.
2. Where in an action of trespass the defendant seeks to show that the plaintiff has no interest in the suit, that he has assigned the cause of action or any interest in the judgment that he expected to obtain, he must set up this matter in his answer. *Id.*
3. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take same by demurrer or answer. *Andrews v. Lynch*, 167.
4. A petition alleging that the plaintiff delivered a slave belonging to him to the defendant for safe keeping, he agreeing to pay defendant a certain sum per day; that said slave had never been delivered by defendant to plaintiff, although plaintiff had demanded said slave from him, is defective; it alleges no contract to re-deliver, no conversion of the slave by defendant, no loss through the negligence of defendant. *Id.*

PLEADING—(Continued.)

5. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence. *Patrick v. Abeles*, 184.
6. It is not necessary that the petition in a suit (under the mechanic's lien act of 1845, R. C. 1845, p. 732, § 7) to enforce a mechanic's lien should contain a prayer for a special execution against the property alleged to be charged with the lien; if the account filed with the petition and referred to therein corresponds with that filed as a lien demand, it sufficiently appears that the object of the suit is the enforcement of the lien. *Johnson v. McHenry*, 264.
7. Under the practice act of 1849, an equitable defence might be made to an action of ejectment. *Hayden v. Stewart*, 286.
8. An action on a guardian's bond must be brought in the name of the state. *Mitchell v. Williams*, 399.
9. Allegations of value in a petition are not admitted by a failure on the part of the defendant to deny them in an answer, or by a default; they are not material traversable allegations. *Field v. Barr*, 416.
10. Where a wrongful entry has been made upon premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain an action of forcible entry and detainer. *Burns v. Patrick*, 434.
11. In a statutory proceeding to foreclose a mortgage, where the defendant sets up as a bar to the action an acknowledgment of satisfaction of the mortgage on the margin of the record thereof, the plaintiff may show in rebuttal that such acknowledgment was procured by fraud. *Valle's Adm'rx v. American Iron Mountain Co.* 455.
12. Where, in cases arising under the practice act of 1849, facts are set up in an answer by way of equitable defence to the action and not by way of set-off, the plaintiff is not required to reply. *Blodgett v. Greene*, 525.
13. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof. *Thomson v. Roatcap*, 283.
14. In proceedings instituted under the revised code of 1845 to foreclose a mortgage, the administrator of the mortgagor was the only necessary party; his heirs were not necessary parties. *Perkins v. Woods*, 547.
15. A petition, in an action for breach of promise of marriage, alleging that about a certain specified date, "the defendant—in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant—did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that though a reasonable time has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused, and still does neglect and refuse," &c., is good after verdict on motion in arrest of judgment. *Davis v. Stagle*, 600.

PLEDGE.

See MORTGAGE. INSURANCE.

POLICY OF INSURANCE.

See INSURANCE.

POSSESSION.

See LIMITATION.

PRACTICE.

See JUSTICES' COURTS. MANDAMUS. LANDLORD AND TENANT, 3, 4.
CONDEMNATION AND APPROPRIATION TO PUBLIC USES. COUNTY
COURTS. APPEAL. ATTACHMENT.

1. Instructions should not be given unless supported by the evidence. *Harrison v. Cachelin*, 26.
2. Verdicts of juries should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evident marks of prejudice, passion or corruption. *Goetz v. Ambts*, 28.
3. The fact that a defendant is present in court, during the trial of the cause in obedience to a subpoena, ready to testify when called, will not render it improper to receive in evidence a deposition of said defendant taken in another cause in which he was a party; though not admissible as a deposition, it may, being signed by him, be received as a written admission. *Charleson v. Hunt*, 34.
4. Where a party to a suit, through no negligence on his part, but through reliance upon the promises of a notary before whom a deposition is being taken, and of the opposing counsel, is prevented from cross-examining the witness, the deposition should be suppressed. *Dannefelser v. Weigel*, 45.
5. Where an instruction given at the instance of a party to a suit is decisive thereof and excludes from the consideration of the jury the questions raised by the evidence of the opposing party, it is erroneous. *Clark v. Hammerle*, 55.
6. A judgment rendered by a justice of the peace is void unless it appears on the face of the proceedings that the justice acquired jurisdiction of the cause by service of process on the defendant or by his appearance. *Bersch v. Schneider*, 101.
7. A new trial will not be granted on the ground of surprise where the object in obtaining the same is the introduction of evidence of a character merely cumulative. *State, to use, &c., v. Wightman*, 121.
8. Where a principal seeks to recover specific sums of money alleged to have been received by his agent in the course of his employment, and misappropriated by him, it is not error to refuse to order an account, prayed for by the plaintiff, to be taken. *Matthews v. Wilson*, 155.
9. The revised code of 1855 does not require a finding of the facts where a cause is tried by the court. *Kurlbaum v. Roepke*, 161.
10. Where a cause is tried by the court without a jury and no instructions or declarations of law are asked or given, the supreme court will not interfere by ordering a new trial. *Id.*
11. It is the settled practice of the supreme court not to interfere with the

PRACTICE—(Continued.)

- verdicts of juries because they are against the weight of evidence. *Smock v. White*, 163.
12. The objection that a petition does not state facts sufficient to constitute a cause of action is not waived by a failure to take the same by demurrer or answer. *Andrews v. Lynch*, 167.
 13. A petition alleging that the plaintiff delivered a slave belonging to him to the defendant for safe-keeping, he agreeing to pay defendant a certain sum per day; that said slave had never been delivered by defendant to plaintiff, although plaintiff had demanded said slave from him, is defective; it alleges no contract to re-deliver, no conversion of the slave by defendant, no loss through the negligence of defendant. *Id.*
 14. Although, in a suit instituted to enforce a mechanic's lien, the plaintiff may fail to show the existence of a lien in his favor, he will be entitled, if the pleadings and the evidence will warrant, to a general judgment. *Patrick v. Abeles*, 184.
 15. The nature of an action is to be determined by the petition and not by the facts as they appear in evidence. *Id.*
 16. In cases commenced since the revised code of 1855 went into effect, (May 1, 1856,) the courts are not authorized to make findings of facts; if made, they do not form part of the record, and will not be regarded by the supreme court for any purpose. *Brosius v. McGaugh*, 230.
 17. A finding of the facts made by a court in a suit instituted since the revised code of 1855 went into effect, being unauthorized by law, forms no part of the record of the cause and can not be referred to in the supreme court for any purpose. *Martin v. Martin's Adm'r*, 227.
 18. Amendments should be liberally allowed in furtherance of justice. *Id.*
 19. Case affirmed because no exceptions were saved. *Bancroft v. Benning*, 235.
 20. An execution issued by a justice of the peace can not regularly be returned before the return day thereof; should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the clerk of the circuit court, and an execution be issued by said clerk upon said certified judgment before the return day of the execution issued by the justice, the circuit court should quash such execution. *Dillon v. Rash*, 243.
 21. Where a judgment is irregularly rendered against the provisions of a statute or the rules of court, the party against whom it is rendered is entitled to have it set aside without showing a meritorious defence to the action. *Doan v. Holly*, 256.
 22. Where a judgment is reversed in the supreme court and the cause remanded to the circuit court, and the mandate of the supreme court is received by the clerk of the circuit court after the commencement of a term of said court, and said clerk, of his own motion, docketts the cause on the third day of the term, and the court renders judgment by default on the fourth day of the term; *held*—no rule of the court appearing to have been violated—that the defendant was not entitled as of right to have this judgment set aside without showing a meritorious defence. *Id.*

PRACTICE—(Continued.)

23. Judgment affirmed because no exceptions were taken to the admission or exclusion of evidence, and no instructions asked, given or refused. *Baker v. Mockbee*, 263.
24. Where cases commenced since the revised code of 1855 went into effect are tried by the court without a jury, questions of law should be raised by instructions, or declarations of law. *Altum v. Arnold*, 264.
25. Where a notice is given that a motion will be presented to a court on the first Monday of May for the confirmation of an award, and the legislature afterwards changes the time of holding said court from the first to the second Monday, the notice will be sufficient; the party to whom the notice is given must take notice of the change. *Price v. White*, 275.
26. The general appellate jurisdiction that the circuit courts exercise over the county courts does not authorize them to try *de novo* causes appealed from the county courts. *Lacy v. Williams*, 280.
27. Where, in an action of ejectment, the person from or through whom the defendant claims title to the premises has, on motion of the defendant, been made a co-defendant, the plaintiff is not entitled to dismiss the suit as to such co-defendant. *Hayden v. Stewart*, 286.
28. Under the practice act of 1849, an equitable defence might be made to an action of ejectment. *Id.*
29. Where a justice of the peace, in the case of separate suits by different parties against the same person, improperly renders a joint judgment in favor of the two separate plaintiffs, and certifies the same as a single judgment to the circuit court, any execution or other proceeding instituted thereon should be quashed and set aside. *Bain v. Chrisman*, 293.
30. In a suit for partition commenced by suing out a writ of summons against the defendants upon a petition filed in the proper clerk's office, the writ of summons should be served upon the minor defendants; it is not necessary, in such cases, to serve such writ upon the guardian of such minor defendants. *Smith v. Davis*, 298.
31. A suit for partition is not triable, except by consent of parties, at the term at which the defendant is first bound to appear. *Id.*
32. An interlocutory judgment in an action for partition, ascertaining the rights of the parties and appointing commissioners, &c., can not regularly be rendered, without the consent of the defendant, at the first term at which he is bound to appear. *Thornton v. Thornton*, 302.
33. *Quere*, when may writs of *certiorari* issue from the supreme court, and what is the proper office and function of such writs? *Hannibal & St. Joseph Railroad Co. v. Morton*, 317.
34. Where a document is admissible in evidence for any purpose, it should not be excluded; it devolves on the opposite party to call on the court to state and explain to the jury how far and for what purposes it is evidence. *Allen v. Moss*, 354.
35. Proceedings, instituted under an act of the legislature for the condemnation and appropriation of private property, commenced without notice to the owner thereof, are void. *Dickey v. Tennison*, 373.
36. After a jury has returned a special verdict, the court should not resub-

PRACTICE—(Continued.)

- mit the cause to them for a general verdict with instructions. *Spalding v. Mayhall*, 377.
37. In suits in justices' courts, as well as in suits in the superior courts, the defendant, in order to impose upon the plaintiff the necessity of proving the execution of an instrument sued on, must deny its execution under oath. *Hickman v. Kunkle*, 401.
 38. The supreme court will not review instructions unless they are excepted to at the time they are given or refused. *Bradley v. Creath*, 415.
 39. In cases tried by a court without a jury under the practice act of 1849, the court should find the facts. *Chick v. Parker*, 418.
 40. A suit on a promissory note by an assignee against the maker is triable at the first term, although the assignment is denied. *Armstrong v. Johnson*, 420.
 41. An appeal to the supreme court must be made, under the revised code of 1855, during the term at which the judgment or decision appealed from is given; it can not be made before the clerk in vacation. (R. C. 1855, p. 1287, sec. 11.) *Stavely v. Kunkel*, 422.
 42. Where it appears from the face of the record of a cause appealed to the supreme court that the plaintiff has no cause of action, the supreme court will reverse a judgment rendered in his favor, although the point upon which the reversal takes place was not brought to the attention of the lower court. *Burns v. Patrick*, 434.
 43. Whether a default shall be set aside is a matter within the discretion of the courts to which application is made for that purpose. *Ridgley v. Steamboat Reindeer*, 442.
 44. Suits instituted in the St. Louis court of common pleas are triable at the return term "in all cases in which the parties continued to be proceeded against at such term shall have been personally summoned for at least fifteen days before the first day of such term;" (R. C. 1855, p. 1595;) inquiry of damages may be made at the return term in a case of judgment of default against a steamboat. *Id.*
 45. A party to a suit has no right to the reversal of a judgment therein for errors that do not in any way affect him, but other of the parties alone. *Papin v. Massey*, 445.
 46. The only objection that can be entertained by the court—under the seventh section of the local act of March 3, 1853, concerning the duties of sheriff and marshal in the county of St. Louis, (Sess. Acts, 1855, p. 464)—to an indemnification bond demanded by the sheriff under said act is in relation to the sufficiency of the security; it can not be objected that the penalty of the bond is insufficient. *Cochran v. Goddard*, 500.
 47. The action of the court under the 8th section is not conclusive on the claimant as to any other valid objection to the bond. *Id.*
 48. After the plaintiff in an action against the endorsers of a promissory note has closed his testimony and an instruction has been moved upon it, it is not error to permit him to recall a witness to show the character of the notice given to the endorsers. *Johnson v. Mason*, 54.
 49. A judgment will not be reversed on account of the admission of irrele-

PRACTICE—(Continued.)

- vant testimony, unless it is calculated to injure the party complaining of its admission. *Newman v. Mays*, 520.
50. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant. *State v. Emmitz*, 521.
 51. Where there is any testimony which tends to support any of the issues in a cause, it is error to instruct the jury that there is no evidence before them. *Yates v. Brackenridge*, 531.
 52. By the rules of chancery practice in force prior to the passage of the practice act of 1848, bills of exceptions were as necessary as in common law suits. *Madden's Heirs v. Madden's Adm'r*, 544.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. An application for a new trial on the ground of newly discovered evidence should, as a general rule, be accompanied by the affidavit of the party seeking the new trial; the affidavit of a third person should never be received without an explanation of the reason why the party himself omitted to make it. *The State v. McLaughlin*, 111.
2. In all cases in which a person arraigned upon an indictment does not confess the indictment to be true, a plea of not guilty should be entered, and the same proceedings should be had as if he had formally pleaded not guilty to the indictment. (R. C. 1855, p. 1181, § 5.) *State v. Andrews*, 267.
3. In the case of a conviction for an offence not capital, an omission to enter of record the *allocution*, or formal address of the judge to the prisoner, asking him if he has any thing to say why sentence should not be pronounced against him, is not of itself fatal. *The State v. Ball*, 324.
4. In the entry of the empannelling of a jury, the jury were stated to be "twelve good and lawful men," and their names were given, but the same name was inserted twice, making thirteen in all; *held*, that this was merely a clerical error. *Id.*
5. An affirmative verdict, in response to an indictment for murder in the first degree, of "guilty of murder in the second degree, in manner and form as charged," &c., is by implication an acquittal of murder in the first degree, and, so long as it stands, it is a bar to any prosecution for the higher grade of offence. *Id.*
6. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence. *The State v. Cross*, 332.
7. The fifth section of the seventh article of the act concerning practice in criminal cases (R. C. 1855, p. 1196) is not applicable to prosecutions for assault and battery commenced before justices of the peace; the jury, in the case of a conviction, must assess the fine to be paid. (See R. C. 1855, p. 979, § 11.) *The State v. Warne*, 418.
8. In retaxing the costs in a cause, if the fees are not legally chargeable they will be disallowed; if the fee-bill on its face is illegal, it must be rejected; but if the charges are such as may have been legally incur-

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(Continued.)

red in the prosecution or defence of the action, the fee-bill will be taken to be *prima facie* correct, and the burden of showing its incorrectness is on him who objects to it. *The State v. McO'Blenis*, 508.

PRESUMPTIONS.

See EVIDENCE. CONVEYANCE. LIMITATION.

PRINCIPAL AND AGENT.

1. Where an agent enters into a contract in his own name and does not disclose his principal he is personally liable. *McLellan & Hillyer v. Parker*, 162.
2. One who ratifies an act done in his name without previous authority ratifies it as done; he can not make such an agent responsible for not doing the ratified act in the manner he would have been bound to perform it if he had been an authorized agent. *Menkens v. Watson*, 163.
3. A factor may pay over to his principal the proceeds of goods consigned to him for sale, although he may know that his principal had promised to pay certain of his creditors out of such proceeds. *Pearce v. Roberts*, 179.

PRIVILEGE OF RESHIPPING.

See COMMON CARRIER, 3, 4.

PRIVILEGED COMMUNICATIONS.

1. Communications made to an attorney at law as such are privileged, and the attorney can not be permitted to testify concerning them without the consent of the client. This rule applies to the case where two persons, having hostile interests, consult the same attorney, at the same time, with respect to the matter in dispute, and one of such parties calls upon the attorney to testify with respect to the declarations and admissions made by the other at the consultation. *Hull v. Lyon*, 570.
2. Whether a communication is a privileged one is a question for the court. *Id.*

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC WORSHIP.

See CRIMES AND PUNISHMENTS.

R

RAILROADS.

See COMMON CARRIER.

RATIFICATION.

See PRINCIPAL AND AGENT.

RECOGNIZANCE.

1. Where a justice of the peace takes a recognizance to keep the peace, he is required to transmit to the clerk of the proper court only the recognizance, and not the affidavit and warrant. *The State v. Emnitz*, 521.

RELEASE.

1. A covenant not to sue one of several persons jointly liable will not discharge the others. *Carondelet v. Desnoyer's Adm'r*, 36.
2. At common law a release of one of several joint obligors would discharge all; to have this effect, however, it must be a technical release under seal. *McAllister v. Dennin*, 40.
3. A judgment was recovered against A. and B. on an official bond in which B. was principal and A. his security. B. died leaving him surviving a widow and daughter, his only heir. A. was compelled to pay a portion of the judgment. C., to whom the judgment had been assigned and who had control over it, in consideration of the compromise and dismissal of various suits instituted against him by the heir of B., covenanted by instrument under seal with the said widow and heir never to use or enforce said judgment so far as the same could be made to affect the heirs, executors, or administrators of B., or any property owned by them as such heirs, &c., except as to two specified tracts of land, with respect to which he reserved the right of using said judgment as he might see fit. He also reserved the right of using said judgment against A. and his property. Notwithstanding the execution of this instrument, C. procured the allowance by the probate court of said judgment as a claim against B.'s estate, and it was classed in the fourth class of allowed claims. A. procured the allowance in his favor of a claim against B.'s estate for the amount paid by him in part satisfaction of said judgment; this claim was assigned to the fifth class. *Held*, in a suit instituted by A. against B.'s administrator and C. for the purpose of having the allowance of said judgment in C.'s favor set aside and the assets in the hands of the administrator applied to the payment of A.'s claim, that the instrument executed by C. operated a release of the judgment as against B.'s estate; that (the claims of A. and C. being the only allowed claims) C. was not entitled to have said judgment allowed as a claim against B.'s estate so as to protect the assets thereof (except the excepted property) from the payment of the claim of A.; that said instrument operated a like release of the judgment as to A., he being only a security. *Hempstead v. Hempstead's Adm'r*, 187.
4. A release of one of several sureties by the creditors will discharge the the others only so far as the released surety would be bound to make contribution if the other sureties or any of them should pay the entire debt. *Dodd v Winn*, 501.
5. The relation of maker and endorser of a promissory note so far continues, after the recovery of judgments against them at the suit of an endorsee, that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, 505.

RENT.

See LANDLORD AND TENANT.

RES ADJUDICATA.

See PARTNERSHIP, 1. ADMINISTRATION, 4.

1. A. contracted to build for B. a house; C. and A. agreed to secure B. against all liens, claims and losses. Liens were filed by sub-contract-



RES ADJUDICATA—(Continued.)

tors against said house upon which writs of *scire facias* were issued against A. and B. These writs were served upon B., the owner, but not upon A. Judgments by default were rendered against B., which he paid. *Held*, in a suit instituted by B. against C. to recover damages for the breach of the agreement above referred to, that the records and proceedings in said suits against B. were admissible in his favor to show the amount of the judgments, and the payment of them by him. The judgments were not, however, conclusive upon C. *Picot v. Signiaco*, 125.

2. Judgments in enforcement of liens against A. and B., upon service or process upon both, would be conclusive upon C. *Id.*
3. A judgment recovered is conclusive as between the parties thereto as to all matters directly in issue. *Ridgley v. Stillwell*, 128.
4. This rule does not extend to matters collaterally or incidentally considered. *Id.*
5. A judgment rendered by a probate court against an administrator, requiring him to pay over to the distributees a certain sum of money as assets of the intestate's estate, is, in the absence of fraud or collusion, conclusive upon the securities of the administrator in a suit on his official bond. *The State, to use, &c., v. Holt*, 340.
6. In an action on a guardian's bond the settlements and allowances of the guardian in the probate court are conclusive upon the ward. *Mitchell v. Williams*, 399.
7. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the interlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, 570.

RESULTING TRUST.

See FRAUD AND FRAUDULENT CONVEYANCES, 9.

RETAXING COSTS.

See COSTS.

RETROSPECTIVE LAWS.

See BOATS AND VESSELS, 6.

RETURN DAY.

See EXECUTION.

ROADS AND HIGHWAYS.

See DEDICATION TO THE PUBLIC.

1. No owner of land over which a road passes can change its location in

ROADS AND HIGHWAYS—(*Continued.*)

any other manner than that prescribed by law. *The State v. Young*, 259.

2. When user alone, disconnected with any act of the owner showing an intention to dedicate, is relied on as evidence of a dedication of a right of way to the public, it must continue the length of time necessary to bar an action to recover the possession of land; the same length of time of nonuser would, it would seem, be necessary to raise a presumption of abandonment by the public. *Id.*

S

ST. CHARLES.

1. Under the act of December 22, 1824, (R. C. 1825, p. 211,) the trustees of the town of St. Charles had power to lease the common of the town. *McDonald v. Schneider*, 405.
2. It is not sufficient to invalidate such a lease that it was executed in the name of the trustees of the town and not in the name of "The inhabitants of the town of St. Charles"—the corporate name of the town. *Id.*

SALE.

See STATUTE OF FRAUDS. CONDITIONAL SALE. VENDOR AND PURCHASER. SHERIFF'S SALE.

1. Where the delivery of a chattel is conditional, the property will not vest until the condition is performed, or the performance thereof is waived. *Dannefelser v. Weigel*, 45.
2. Where a vendor knows the existence of a latent defect in an article sold by him, and sells the same for a sound price without disclosing the defect to the vendee, he is guilty of a fraud; such fraud may be set up as a defence to an action founded on a note given for the price of the article sold; it is not necessary that there should be any express warranty or representation as to the quality of the article sold. *Barron v. Alexander*, 530.

SATISFACTION OF MORTGAGE.

See MORTGAGE, 7, 8, 9.

SCHOOL TRUSTEES.

See EVIDENCE, 13.

SECURITY.

See SURETY.

SET-OFF.

1. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defence that existed at the time of or before notice of the assignment as against the assignor thereof. *Thomson v. Roatcap*, 283.

SET-OFF—(Continued.)

2. Where, in cases arising under the practice act of 1849, facts are set up in an answer by way of equitable defence to the action and not by way of set-off, the plaintiff is not required to reply. *Blodgett v. Greene*, 525.

SHERIFF.

See INDEMNIFICATION BOND. SHERIFF'S SALES.

SHERIFF'S SALES.

See INDEMNIFICATION BOND.

1. Under the act of July 3, 1807, (1 Terr. Laws, p. 120, § 45,) a sheriff's deed unacknowledged in court was ineffectual to pass the title to the purchaser; the authority of the sheriff being statutory, it should have been strictly pursued. *Allen v. Moss*, 354.
2. A sheriff's deed must be under seal; if not sealed, a court of equity can not aid its imperfect execution; nor should a court presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted by mistake to seal the deed. *Moreau v. Branham*, 351.
3. A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof in writing must be made to bind the parties. *Wiley v. Roberts*, 388.
4. A memorandum made by a deputy sheriff and signed by him of a sale of one of several lots in a partition proceeding, in which Louis Robert and others were plaintiffs, and one B. T. Adams defendant, was as follows: "Partition, Lands—Louis Robert v. B. T. Adams—Lot No. 11—274 80-100 a.—Louis Robert—\$10.50 per a.—\$2,885.40." *Held*, that this memorandum was sufficient to take the case out of the statute of frauds. *Id.*
5. The sheriff can, in such case, maintain an action in his own name against the purchaser for the purchase money, although the latter may not have given a note therefor to the sheriff. *Id.*
6. Where a sale in partition proceedings is made and the land embraced in the suit is bid off by one of the parties, the purchaser can not, by any agreement with any of the parties to the suit with respect to the land and the payment of the purchase money, affect the right of the sheriff to collect of such purchaser his lawful fees or enough of the purchase money to pay the costs and the portions of the purchase money belonging to those parties, if any, who do not enter into any agreement in the nature of a release with the purchaser. *Id.*
7. L., being indebted to D., E. and F., assigned to D. in trust to secure said D., E. and F. certain promissory notes executed by O. & R. One J. recovered a judgment against L. Afterwards said L., D., E., F., O. & R. entered into an arrangement, by which, upon the allowance of certain credits upon said notes, O. conveyed a certain lot of ground to L., and L. at the same time conveyed the same in trust to secure D., E. and F. The sum bid by D. at this sale was less than the amount of the indebtedness, to secure which the deed of trust was given. The land was sold under this deed of trust, and D. became the purchaser. J. caused an execution to be issued upon his judgment against L.

SHERIFF'S SALES—(Continued.)

and to be levied upon L.'s interest in said lot. *Held*, that L. had no interest in the lot upon which J.'s judgment might operate as a lien; that consequently no title would pass to a purchaser at a sheriff's sale under said execution; that an injunction would not lie to restrain a sheriff's sale thereunder. *Drake v. Jones*, 428.

8. Sheriff's sales can not be enjoined on the ground that they will pass no title and may cast a cloud on the title of the true owner. *Id.*

SLAVE.

See WARRANTY.

SPANISH LAW.

1. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof. *Clark v. Hammerle*, 55.
2. By the Spanish law a verbal sale of immovable property was valid; to constitute such a sale valid it was not necessary the vendee should take possession, though taking possession would be strong corroborative evidence of such a sale. *Allen v. Moss*, 354.
3. The eighth section of the act of October 1st, 1804, (1 Terr. Laws, p. 47,) requiring all deeds and conveyances to be recorded under the penalty of being adjudged fraudulent and void against subsequent purchasers and mortgagees, did not overthrow the rule of the Spanish law making verbal sales of land valid. *Id.*

STATUTE OF FRAUDS.

See VENDORS AND PURCHASERS, 5.

1. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds. *Clawwater v. Tetherow*, 241.
2. A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof in writing must be made to bind the parties. *Wiley v. Roberts*, 388.
3. A memorandum made by a deputy sheriff and signed by him of a sale of one of several lots in a partition proceeding, in which Louis Robert and others were plaintiffs and one B. T. Adams defendant, was as follows: "Partition, Lands—Louis Robert v. B. T. Adams—Lot No. 11—274 80-100 a.—Louis Robert—\$10.50 per a.—\$2,885.40." *Held*, that this memorandum was sufficient to take the case out of the statute of frauds. *Id.*•

STATUTE OF FRAUDS—(*Continued.*)

4. The sheriff can, in such case, maintain an action in his own name against the purchaser for the purchase money, although the latter may not have given a note therefor to the sheriff. *Id.*

STEP-CHILD.

See PARENT AND CHILD.

STOCKHOLDER.

See CORPORATION 1.

STRAYS.

1. Where cattle are taken up and posted as strays, and the owner, within a year from the date of such taking up, forcibly takes possession of them, he must pay the legal charges of the one who took them up as strays. *Rice v. Underwood*, 551.

SUNDAY.

See CRIMES AND PUNISHMENTS.

SUPREME COURT.

See PRACTICE.

SURETY.

1. A surety in a promissory note, who gives notice to the payee to commence suit forthwith against the principal, a non-resident of the state, is not exonerated from liability by a failure of such payee to commence suit within thirty days after such notice. (See R. C. 1855, p. 1454.) *Phillips v. Riley*, 386.
2. A release of one of several sureties by the creditors will discharge the others only so far as the released surety would be bound to make contribution if the other sureties or any of them should pay the entire debt. *Dodd v. Winn*, 501.
3. A., the payee of a promissory note obtained judgment thereon against B., one of five sureties; an execution under said judgment was levied on property belonging to B. sufficient to make the debt; A. ordered this execution to be returned unsatisfied; A. subsequently commenced suit against C., another of said sureties; *held*, that if all the sureties were solvent A. could recover of C. only four-fifths of the debt; if all the other sureties were insolvent, he could recover only one-half the debt of C. *Id.*
4. If one of several co-sureties is insolvent, the other co-sureties will be bound to make contribution as among themselves as if the insolvent surety had not been a surety at all. (See R. C. 1845, p. 1000, § 8.) *Id.*
5. The relation of maker and endorser of a promissory note so far continues after the recovery of judgments against them at the suit of an endorsee that an agreement with the maker to stay execution as to him for a specified period will operate a discharge of the endorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, 505.

T

TAXATION.

See TAXING POWER.

1. In a suit instituted in behalf of a town, under the 14th section of the act concerning towns (R. C. 1855, p. 1528), to recover of an individual a tax levied on his property, the defendant can not show that there was inequality in the valuation by the assessor of the taxable property of the town. *Town of Potosi v. Casey*, 372.

TAXING POWER.

See TAXATION.

1. No state has power, under the constitution of the United States, in the exercise of its taxing power, to discriminate in favor of its own manufactures and productions and against those of its sister states. Such a discriminating tax, whether levied on the goods and manufactures of sister states in the original unbroken bale or package in which they are brought into the state, or upon the same after they have become incorporated into the mass of property of the state, would be unconstitutional and void. *The State v. North & Scott*, 464.
2. As a state can not, by a direct tax on the manufactures and productions of sister states, discriminate against them, so it can not accomplish such a result indirectly by requiring a merchant dealing in such manufactures to take out a license and pay a tax thereon, while it levies no such tax upon merchants dealing in articles of its own manufacture and growth. *Id.*
3. The act to tax and license merchants, approved December 11, 1855, (R. C. 1855, p. 1072,) so far as the same required merchants dealing in the manufactures of sister states to take out licenses from the state authorities and to pay a tax on the same, is unconstitutional and void. (NAPTON, Judge, dissenting.) *Id.*
4. A state law requiring an importer of foreign goods, who sells the same in the original unbroken package, to take out a license from the state authorities and to pay a tax on the same, would be unconstitutional. *Id.*
5. The provision of the constitution of the state of Missouri which declares that all property subject to taxation shall be taxed in proportion to its value does not require that all the property in the state shall be taxed, but that when any species of property is selected for taxation it shall be taxed in proportion to its value. *Id.*
6. That provision of the constitution of the state of Missouri, which requires all property subject to taxation to be taxed in proportion to its value, is applicable only to taxation in its usual, ordinary and received sense, to taxation for general state, county, city and town purposes, not to local assessments, where the money raised is expended on the property taxed. *Egyptian Levee Co. v. Hardin*, 495.
7. The act of February 27, 1855, (Sess. Acts, 1855, p. 73; also Adj. Sess. 1855, p. 28,) authorizing the Egyptian Levee Company, thereby incorporated, for the purpose of reclaiming a certain district from inundation

TAXING POWER—(*Continued.*)

by leveeing, ditching and embanking, to levy a tax *per acre* (not exceeding fifty cents) upon the land owners within said district, is constitutional; it is not in conflict with that provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Id.*

TENANT IN COMMON.

See PARTITION, 1.

TORTS.

See DAMAGES. TRESPASS.

1. If, in a case of collision, both parties are in fault and the fault or negligence of each contributes to the injuries received, neither party can be made to respond to the other. This doctrine does not, however, apply to a case in which the fault or negligence of the party seeking a recovery contributes only remotely and indirectly to the injury complained of. *Adams v. Wiggins Ferry Co.*, 95.
2. If both parties actively contribute to the injury at the time of its commission, there can be no recovery by either; where, however, the fault or negligence of one party is merely passive, as where his wrong consists in mooring his boat in a prohibited place at a wharf, he may recover for an injury arising from a collision if the other party does not exercise ordinary care and prudence. *Id.*
3. Where a person hires a slave for a year and the said slave is wrongfully taken out of his possession during the term of service, the measure of damages in a suit against the wrongdoer is the value of the services of the slave during the residue of the term, even though the suit should be instituted before the expiration of such term. *Moore v. Winter*, 380.

TOWN.

See TAXATION. COMMON. ST. CHARLES.

TREBLE DAMAGES.

See DAMAGES, 8.

TRESPASS.

See DAMAGES. TORTS.

1. It is generally sufficient in pleading to state facts according to their legal effect; an averment, in a petition in trespass, that the defendant beat and struck plaintiff, will be sustained by evidence showing that he was present aiding and encouraging others in so beating and striking him. *Goetz v. Ambts*, 28.
2. To warrant a jury in giving exemplary damages, in an action of trespass, it is not necessary to show that the defendant was prompted by ill will and hostility toward the plaintiff. *Id.*
3. If an injury to the person be committed unintentionally and result simply from a want of care, the damages awarded should be compensatory; if it be wilful and intentional, exemplary damages may be allowed. *Id.*
4. Where in an action of trespass the defendant seeks to show that the

TRESPASS—(Continued.)

plaintiff has no interest in the suit, that he has assigned the cause of action or any interest in the judgment that he expected to obtain, he must set up this matter in his answer. *Id.*

TRUSTEE'S SALE.

See VENDORS AND PURCHASERS.

TRUSTS.

See EQUITY. INJUNCTION. VENDORS AND PURCHASERS. FRAUD AND FRAUDULENT CONVEYANCES, 9.

1. The trusts not reached or affected by the statute of limitations are those technical and continuing trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity. *Johnson v. Smith's Adm'r*, 591.
2. If a person, assumig to act as a guardian for another without any legal authority so to do, should receive moneys to be appropriated to the latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Id.*

U

UMPIRE.

See ARBITRATION.

UNITED STATES SURVEY.

See LANDS AND LAND TITLES.

V

VALUATION.

See TAXATION, 1.

VENDOR AND PURCHASER.

See MORTGAGE. CONVEYANCE. SALE. CONDITIONAL SALE.

1. One A. B., being indebted to C. D. in the sum of \$538.96, conveyed a certain tract of land to E. F. in trust to secure the payment thereof. In said deed the land, situate in St. Louis county, was described as follows: "A tract of eighty acres of land in the northern end of survey number 369, confirmed to Samuel Smith, in township 45 north, of range 4 east, commencing, &c., [here follows a description by metes and bounds] and being all the land now owned by said A. B. within said survey No. 369." Default being made in the payment of the indebtedness secured, the trustee proceeded, at the request of C. D. and in accordance with the provisions of the trust deed, to advertise and sell the land. In his advertisement he described the land to be sold by copying the description in the deed of trust. On the day of sale the trustee proceeded to sell; the advertisement was first read, and the land was offered for sale as a tract containing eighty acres, more or less. Bids were asked by the acre for the whole tract. One G. H.

VENDOR AND PURCHASER—(Continued.)

- was the highest bidder at the price of \$8.50 per acre, and the tract was struck off to him at that price, and the trustee gave him a memorandum of said purchase, stating that he, G. H., had become "the purchaser of said land at and for the price of eight dollars and fifty cents per acre, and had paid on his purchase \$500." The trustee paid over the said \$500 to C. D., and it was credited upon the debt. The tract was subsequently surveyed and was found to contain only twenty-three acres. During these transactions none of the parties thereto supposed that the tract contained less than eighty acres. *Held*, in a suit instituted by G. H., the purchaser, against C. D. to recover back the excess of said \$500 over and above the sum that twenty-three acres would have amounted to at \$8.50 per acre, 1st, that the sale by the trustee was not, properly considered, a sale by the acre, but a sale of the tract as a tract; 2d, that the purchaser, having bought the tract as containing eighty acres, could not recover of the *cestui que trust* or creditor the excess sued for; 3d, that he was entitled on the ground of mistake to have the sale set aside. *Coons v. North*, 73.
2. A bathing tub and lead water pipes fastened to the walls and floor of a building by nailing are fixtures as between a vendor and vendee. *Cohen v. Kyler*, 122.
 3. A. purchased certain real estate in his own name and with his own money; at the date of the purchase he agreed with B. that if B. would before a certain specified time pay one-half of the purchase money he should be entitled to one-half of the land; *held*, that A., not paying any portion of the purchase money, had no interest, legal or equitable, in the land; that the contract of B. with A. was within the statute of frauds. *Clawwater v. Tetherow*, 241.
 4. The record of a deed not acknowledged or proved according to the law in force at the time such record was made, imparts notice to all persons of the contents of such deed. (See R. C. 1855, p. 731; Sess. Acts, 1847, p. 95.) *Allen v. Moss*, 354.
 5. Where there has been a part performance of a parol contract for the purchase of land, and the vendor puts it out of his power to specifically perform his contract by selling the land to a *bona fide* purchaser without notice, although there would be no remedy by action at law for damages inasmuch as the contract is by parol, equity will entertain jurisdiction of a bill for compensation. *Lee v. Howe*, 521.
 6. Notice by *lis pendens* can exist only after service of process; nor would a purchaser *pendente lite* be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterwards abandoned. *Herrington v. Herrington*, 560.

VERDICT.

See PRACTICE. JURY. CRIMES AND PUNISHMENTS, 11.

VERIFICATION.

See BOATS AND VESSELS, 8.

VOLUNTARY ASSIGNMENTS.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

W

WAREHOUSEMAN.

1. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence. *Holtzclaw v. Duff*, 392.
2. Where a common carrier engages to carry goods to a certain point, the terminus of the road, and there to deliver them on board a steamboat, the liability of a common carrier continues only until the arrival of the goods at the terminus of the road, and the liability of a warehouseman and forwarding agent then commences; if the goods are damaged while deposited on the levee awaiting the arrival of a steamboat, the owner can recover only for loss occasioned by negligence. *Id.*

WARRANTY.

1. In an action on a warranty of soundness of a negro slave, the declarations of such slave with respect to her symptoms, made by her when sick, are competent evidence as bearing upon the question of unsoundness. *Wadlow v. Perryman's Adm'r*, 279.

WILLS AND TESTAMENTS.

1. Although an appeal will lie from an order of a probate court revoking letters of administration, yet, where the revocation is made for the reason that a will had been found and admitted to probate, the circuit court can not on such appeal inquire into the sufficiency of the proof upon which the probate court acted in granting probate of the will. *In re, Milton Duty's Estate*, 43.
2. The validity of a will duly proven can be contested only in a proceeding instituted for that purpose under section 30 of the act concerning wills (R. C. 1845, p. 1083; R. C. 1855, p. 1571, sec. 30); an appeal will not lie from an order of a probate court granting probate of a will. *Id.*
3. In March, 1789, one Joachim Roy made his will; it was executed in the presence of the lieutenant governor of Upper Louisiana, and attested by him and seven other witnesses; it was deposited among the archives of the Spanish government and a copy thereof was given out by the lieutenant governor of said province on the 24th of July, 1801, a few months after the death of said Roy; *held*, that the will was a valid and operative instrument under the Spanish law without further proof. *Clark v. Hammerle*, 55.
4. Every person who shall sign a testator's name to a will by his direction must subscribe his own name as a witness and state that he subscribed the testator's name at his request; if he does not so state, the will is void. *Simpson v. Simpson*, 288.
5. A. died in 1844, devising his property as follows: "I hereby grant, give and bequeath unto my beloved wife, B., all and singular my property and estate, real, personal and mixed, in law and equity, including as well all I possess at present as such as I may acquire hereafter, to have and to hold the same unto her, my said wife, as her own and

WILLS AND TESTAMENTS—(Continued.)

exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not, forever." The said A. left him surviving his said wife and four children. *Held*, that there was an intestacy as to the children of A., they not being named or provided for within the meaning of the 30th section of the act concerning wills. (R. C. 1835, p. 620.) *Hargadine v. Pulte*, 423.

6. A devise of land will carry with it a crop growing thereon at the death of the testator unless the testator otherwise directs. *Pratte v. Coffman's Exec'r*, 420.
7. A testator devised a plantation to three grand-children; he then proceeded to direct the sale by the executor of certain real estate, "also all the perishable part of my estate, such as horses, mules, cattle of every description, plantation tools, household and kitchen furniture, crops on hand, and all other personal property not herein otherwise disposed of," &c. *Held*, that a crop growing on said plantation at the death of the testator passed to the devisees and not to the executor. *Id.*

WITNESS.

See WILLS AND TESTAMENTS, 4.

1. In an action for a malicious prosecution, in which it was alleged by the plaintiff that the defendants appeared before the grand jury, and, without probable cause, &c., caused plaintiff to be indicted for perjury, no grand juror can be permitted to testify and disclose the name of any witness who appeared before said jury. *Beam v. Link*, 261.
2. Interest in the event of a suit does not render the person so interested an incompetent witness. *Sawyer v. Mitchell*, 510.
3. The fact that a person introduced as a witness had, before the commencement of the suit, received an order from the plaintiff for sum sued for, the order not being accepted in discharge of the debt due him from the plaintiff, and that he was authorized to bring suit for the plaintiff, does not disqualify him as a witness in behalf of the plaintiff; the suit is not prosecuted for his immediate benefit. *Id.*

WRONGS.

See TORTS.

